1198 15-4 US 5-11

Supreme Court of the United States.

HENRY A. MORGAN, AS PRESIDENT OF THE NEW YORK TIMES,
Plaintiff in Error,

vs.

SIGISMUNDO E. HALBERSTADT,
Defendant in Error.

TRANSCRIPT OF RECORD.

No liability can be imposed on these minority stockholders of the Pan Handle Company, by the loose declarations or statements of stockholders or directors of the Valley Company. H. J. Jewett was never president of the Pan Handle, as Mr. McKee seemed to have thought he was.

Simon Borg the New York broker's testimony, or guess, is no better; but I will not dwell on this any further, as Judge Harrison has fully discussed this matter in his brief and shown that no reliance was placed on the lease by any purchaser and that no one had a right to purchase bonds on the supposition that the lease was mortgaged or that the bonds were guaranteed by the Pan Handle Company.

There is really no pretence that over $35,000 of bonds changed hands, at any rate. The $1,500,000 of mortgage bonds are substantially held now by the same parties who held them when the lease was executed, and justice will be done by requiring the mortgagees, hereafter at least, to look to their own mortgage security for payment and preventing further encroachment upon the earnings of the Pan Handle.

We submit, without further argument, that this lease has been legally vacated; that Moran, as trustee or mortgagee, never had any lien upon or interest in said lease; that he has no right, in a court of equity, to have said lease revived or further enforced, and that this court will not be authorized under the circumstances to grant the relief prayed for as against these defendants.

Respectfully submitted.

J. M. ESTEP.

CADIZ, OHIO.

R. Q. Harrison.

Supreme Court of the United States

HENRY A. MORGAN, as President of THE [illegible]

vs.

SIGISMUNDO L. HALBERSTADT,

TRANSCRIPT OF RECORD.

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United States of America, ss : 1

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

[L. S.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Sigismundo E. Halberstadt, plaintiff, and Henry A. Morgan, President of the *New York Times*, 2
defendant, a manifest error hath happened, to the great damage of the said Henry A. Morgan, President of the *New York Times*, as is said and appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the City of New York, together with this writ, so that you have the same at 3
the said place, before the Judges aforesaid, on the 13th day of June, 1893, that the record and proceedings aforesaid being inspected, the said Judges of

the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 16th day of May in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. H. LACOMBE.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from 3 to 158 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Henry A. Morgan, as President of the *New York Times*, plaintiff in error, against Sigismundo E. Halberstadt, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this thirteenth day of June, in the year of our Lord one thousand eight hundred

and ninety-three, and of the Independence of the United States the one hundred and seventeenth. 7

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Endorsed)—The U. S. Circuit Court of Appeals for the Second Circuit.—Henry A. Morgan, President of the *New York Times*, Plaintiff in Error, *vs.* Sigismundo E. Halberstadt, Defendant in Error.—Writ of Error.—Townsend, Dyett & Einstein, 247 Broadway, Attorneys for Plaintiff in Error.—Service of a copy of the within writ of error is hereby admitted this 18th day of May, 1893.—Robert H. Griffin, Atty. for Deft. in Error.—U. S. Circuit Court, filed May 19, 1893, John A. Shields, Clerk.

8

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SIGISMUNDO E. HALBERSTADT

AGAINST

HENRY A. MORGAN, President of the *New York Times*.

9

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the

City of New York, this 2d day of December, in the year one thousand eight hundred and ninety-one.

JOHN A. SHIELDS,
Clerk.

[SEAL.]

ROBT. H. GRIFFIN,
Plaintiff's Attorney,
Office and Post Office address,
45 Wall Street,
New York City.

ROBERT G. INGERSOLL,
Of Counsel.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIGISMUNDO E. HALBERSTADT,
Plaintiff,

AGAINST

HENRY A. MORGAN, President of the *New York Times*,
Defendant.

The plaintiff above named, by Robert H. Griffin, his attorney, complains of the defendant above named, and shows to the Court as follows:

I.

For a first cause of action:

FIRST.—That the plaintiff is, and at all the times hereinafter mentioned was, a subject of the King of Denmark, residing since the year 1889 in the Republic of Mexico.

SECOND.—That at and before the times of the publications hereinafter mentioned, and at the time of the commencement of this action, the *New York Times* was, and still is, an unincorporated joint stock association, consisting of seven or more associates, having its principal place of business in the City of New York, at which said times the defendant, Henry A. Morgan, was and now is the president of said association, the said association being engaged, amongst other things, in the business of publishing, circulating and vending a daily newspaper known as and called "*The New York Times*," the said association then and now being a citizen and resident of the State of New York. 13

14

THIRD.—That since the year 1884 the plaintiff has been connected in business with, and employed in various capacities by the New York Life Insurance Company, a domestic corporation; that is to say: During the year 1884, as soliciting agent for the said company in the Republic of Peru, South America; in 1885 to and including the year 1887, in the Republic of Bolivia, South America, in there establishing and promoting the business of the said company, this plaintiff, during the last year of his employment in Bolivia, acting as sub-agent general for the said company; from September, 1887, to June, 1889, as assistant manager of the said company in the Republic of Chili, South America, and from 15 October, 1889, until the present time, as manager of the said company's business in the Republic of Mexico; his duties in the various capacities aforesaid being among others, to collect premiums due on the policies issued by the said company in the said counties, and to remit such premiums to said company.

FOURTH.—That the aforesaid New York Life Insurance Company is, and at all times herein mentioned was, a corporation organized under the laws of the State of New York and carrying on business

16 as a life insurance company authorized to make insurance on lives, grant annuities and to transact other business connected therewith, said corporation having its principal place of business in the City of New York and having agencies and carrying on business in the State of New York, and in other States of this Union, and in various countries in South America, amongst others those hereinbefore mentioned, and elsewhere.

That one William H. Beers is, and at all the times hereinafter mentioned was, the president of said company.

That at all times from and after January 1, 1887, to November 25, 1890, one Joaquin Sanchez and
17 one Julio Merzbacher were in general charge of all the South and Central American and Mexican business of said insurance company, they being the agents of said insurance company, and being in charge of what was known as and called The Spanish American Department of the New York Life Insurance Company. That at all times from and after the said November 25, 1890, the said Joaquin Sanchez was and now is in sole and general charge of said business and of said department of said insurance company.

FIFTH.—That on the 5th day of September, 1891, the defendant maliciously published in the said *The New York Times*, and caused to be circulated
18 throughout the United States and elsewhere, certain false and defamatory matter concerning this plaintiff, and concerning his management of the business and affairs of the said The New York Life Insurance Company, said false and defamatory matter being as follows:

"This is the situation in the Beers" (meaning the president of said insurance company) "Mutual Ad-"miration Society at Broadway and Leonard street" (meaning the said insurance company). "Every-"thing is done to avoid publicity and to screen the "truth. Not one of the twenty men composing the

"Board of Trustees, save those two or three who "hold executive offices, knew of the Merzbacher de- "falcation" (meaning the Merzbacher above mentioned) "until the *Times* exposed it. Not one of "these men, these alleged guardians of trust funds, "knows that Halberstadt" (meaning this plaintiff) "Beers'" (meaning the said president's) "Mexican "agent" (meaning this plaintiff) "is short in his "accounts $28,000" (meaning that plaintiff had embezzled that amount of the said insurance company's funds), "and yet this same Halberstadt" (meaning this plaintiff) "while standing in the barroom of the "Hoffman House early last March, surrounded by "such men as Merzbacher and Dinkelspiel, boasted "of the manner in which he" (meaning this plaintiff) "was helping himself to the company's funds" (meaning that this plaintiff was embezzling the said insurance company's funds).

SIXTH.—That by means and by reason of said publication plaintiff has been injured in his reputation, character and standing to his damage, fifteen thousand dollars.

II.

For a second, separate and distinct cause of action, this plaintiff, repeating each and all of the averments hereinabove contained as if herein specifically and at large set forth, further shows unto the Court:

FIRST.—That on the 30th day of September, 1891, the defendant maliciously published in the said *The New York Times*, and caused to be circulated throughout the United States and elsewhere certain false and defamatory matter concerning this plaintiff, and concerning his management of the business and affairs of the said The New York Life Insurance Company, said false and defamatory matter being as follows:

"These agents" (referring to and meaning this plaintiff's predecessors in Mexico, namely, John

22 Davis and two others), "or one of them at least, "owed his appointment to the defaulter Merzbacher. "Their shortage was found to be $60,000" (meaning that they had embezzled that amount of the said insurance company's funds). "Neither of them was "arrested. The case of the intemperate German "agent" (meaning this plaintiff) "who was found "to be short in his accounts $12,000 in Chili" (meaning that this plaintiff whilst in Chili had embezzled that amount of said insurance company's funds), "and who was subsequently transferred to "Mexico, is another familiar story. This agent" (meaning this plaintiff) "was not only not pun- "ished" (meaning that this plaintiff should have
23 been criminally prosecuted and convicted of the crime of embezzlement, theft or larceny and punished therefor), "but he" (meaning this plaintiff) "was "transferred to another agency."

SECOND.—That by means and by reason of said publication plaintiff has been injured in his reputation, character and standing to his damage, fifteen thousand dollars.

III.

For a third, separate and distinct cause of action, this plaintiff, repeating each and all of the averments hereinabove contained as if herein specifically and at large set forth, further shows unto the
24 Court:

FIRST.—That on the 10th day of October, 1891, the defendant maliciously published in the said *The New York Times*, and caused to be circulated throughout the United States and elsewhere, certain false and defamatory matter concerning this plaintiff and concerning his management of the business and affairs of the said The New York Life Insurance Company, said false and defamatory matter being as follows:

"The notoriously bad character of the agents "whom Mr. Beers" (meaning the President of the

said insurance company) "employs to do the work "of the New York Life Insurance Company" (meaning that this plaintiff, amongst others, was of a notoriously bad character), "is a theme that constantly "presents new features and new attractions. "Dinkelspiel, Merzbacher, Webber, Stoddard, "Moore, Halberstadt" (meaning this plaintiff), "Davis and Vanuxem are names that stand at the "head of the list of Mr. Beers'" (meaning the president of said insurance company) "warm personal "friends and admirers, and to each of these men he "had given valuable appointments with unlimited "opportunities to swindle and deceive the policy "holders. The readers of the *Times* are entirely "familiar with the methods and the extent to which "the agents named" (meaning this plaintiff amongst others) "have availed themselves of those opportunities" (meaning that this plaintiff on many and various occasions swindled and deceived the policy holders of said insurance company).

SECOND.—That by means and by reason of said publication plaintiff has been injured in his reputation, character and standing to his damage, fifteen thousand dollars.

IV.

For a fourth, separate and distinct cause of action this plaintiff, repeating each and all of the averments hereinabove contained as if herein specifically and at large set forth, further shows unto the Court:

FIRST.—That on the 1st day of November, 1891, the defendant maliciously published in the said *The New York Times*, and caused to be circulated throughout the United States and elsewhere, certain false and defamatory matter concerning this plaintiff and concerning his management of the business and affairs of the said The New York Life Insurance Company, said false and defamatory matter being entitled and being as follows:

28 "WHAT THE BOOKS CONTAIN.

"PROOF OF PRESIDENT BEERS' WRETCHED MANAGE-
"MENT. IF THE RECORDS OF THE SPANISH-AMER-
"ICAN DEPARTMENT OF THE NEW YORK LIFE
"HAVE NOT BEEN ALTERED, THERE IS TROUBLE
"AHEAD.

* * * * *

"Since the present feeling of distrust of the "Company's management arose, efforts have been "made to enlighten a deceived lot of policy holders "concerning the abuses of various sorts committed "by Messrs. Beers, Merzbacher, Dinkelspiel, "Sanchez and others" (meaning that this
29 plaintiff, amongst others, abused the trust and confidence reposed in him by the said insurance company), "but notwithstanding all that has been said it "is evident to those who, like myself, are acquainted "with the management of the Spanish-American "department, that there are details of an import-"ant nature lacking. It is a fact that the most im-"moral methods of doing business prevail in that "department, and that the arch conspirator who, "next to Beers" (meaning the president of said insurance company) "is responsible for these immor-"alities is Sanchez" (meaning the manager of the "Spanish-American department of said insurance "company) "himself." * * * "He and his sub-
30 "agents" (meaning this plaintiff amongst others) "have made use of all sorts of exaggerations and "deceits in Spanish-America" (meaning that this plaintiff amongst others had been guilty of exaggeration and deceit in the management and conduct of the Spanish-American business of said insurance company) "where the insurance public is "completely ignorant of life insurance, and where "the most improbable stories as to conditions of "policies and the results that will accrue from them "may be told with perfect safety." * * * "S. "E. Halberstadt" (meaning this plaintiff) "is an-"other one of the company's agents to whom at-

" tention must be drawn if the company's affairs in 31
" Spanish-America are to be thoroughly exposed "
(meaning that this plaintiff has so conducted himself in the management and care of the said insurance company's business placed in his charge as to seek to avoid publicity and examination). " This man " (meaning this plaintiff) " is said " to have been a defaulter while in the em- " ploy of the New York Life in Peru and Chili. " He " (meaning the plaintiff) " has been for some " years the company's representative in Mexico, " where his accounts have steadily run in arrears, " as he himself boasted one night at the Hoffman " House in this city " (meaning that this plaintiff, as the representative of the said insurance company in 32
Mexico, had embezzled the funds of the said insurance company). " The entire staff of the Spanish- " American Department have been witnesses to the " scandalous quarrels that took place between Merz- " bacher " (meaning the Merzbacher aforesaid) " and " Halberstadt " (meaning this plaintiff) " in the " former's private office in this city. One of the " most remarkable things about this man's " (meaning this plaintiff's) " career is the freedom with which " he talks about the officers of the company, nota- " bly President Beers and his son-in-law Berthelot. " Halberstadt " (meaning this plaintiff) " was a can- " didate for Merzbacher's position but he has not " obtained it yet. Another agent who has stolen 33
" the company's money " (meaning that this plaintiff in addition to said " other agent " and others had stolen from such insurance company) " in Span- " ish America was until very recently manager at " Buenos Ayres."

SECOND.—That by means and by reason of said publication plaintiff has been injured in his reputation, character and standing to his damage, fifteen thousand dollars.

Wherefore, plaintiff demands judgment against

34 the defendant for the sum of sixty thousand dollars, together with the costs of this action.

ROBERT H. GRIFFIN,
Attorney for Plaintiff.

Office and Post Office Address,
45 Wall Street,
New York City.

ROBERT G. INGERSOLL,
Of Counsel.

City and County of New York, ss.:

ROBERT H. GRIFFIN, being duly sworn, says: That he is the attorney for the plaintiff herein; that he
35 has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason why this complaint is not verified by the plaintiff is that the plaintiff is not within the State of New York, but is at present without the State, in the Republic of Mexico; that the sources of deponent's knowledge as to the truth of the foregoing allegations are written communications had and received from the plaintiff and the perusal of the issues of the *New York Times* above referred to.

ROBERT H. GRIFFIN.

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Sworn to before me this 2d day of December, 1891.

GUSTAVUS W. RAWSON,
[SEAL.] Notary Public (No. 5),
N. Y. City and Co.

(Endorsed)—U. S. Circuit Court, Southern Dist. of N. Y.—Sigismundo E. Halberstadt against Henry A. Morgan, &c.—Original Summons and Complaint.—Robert H. Griffin, Attorney for Plaintiff.—Office and Post Office Address, 45 Wall Street, New York City.—Robert G. Ingersoll, of Counsel.

UNITED STATES CIRCUIT COURT, 37

SOUTHERN DISTRICT OF NEW YORK.

SIGISMUNDO E. HALBERSTADT,
Plaintiff,

AGAINST

HENRY A. MORGAN, President of the *New York Times*,
Defendant.

Amended Answer.

38

The defendant, answering the complaint in this action,

As a first defense to the first cause of action set forth therein:

I.—Denies that he has any knowledge or information sufficient to form a belief of the allegations, or any of them, contained in the paragraph or subdivision of the complaint numbered "first," and the defendant denies each and every allegation in the paragraph or subdivision of the complaint numbered "second."

II.—The defendant denies each and every allegation in the paragraphs or subdivisions of the complaint numbered "fifth" and "sixth." 39

As a second and separate defense to the first cause of action set forth in the complaint:

III.—This defendant repeats and makes part of this defense the denials contained in paragraphs I. and II. of this answer as if herein specifically reiterated and set forth, and alleges:

IV.—That, since the year 1882, the plaintiff has been connected in business with, and employed in

various capacities by The New York Life Insurance Company, a domestic corporation, organized under the laws of the State of New York, and carrying on business as a life insurance company. That, during the years 1882, 1883 and 1884, the plaintiff was employed by the said company as its agent, in the Republic of Peru, South America, and during the years 1885, 1886 and 1887, as its agent in the Republic of Bolivia, South America. That, among the duties of the plaintiff, as such agent, was that of collecting the premiums due on the policies of insurance issued by the said company in said countries and to account for such premiums and to remit the same to said company. That the plaintiff collected said premiums and, out of the premiums so collected by the plaintiff during said years, the plaintiff has wrongfully kept and retained to his own use, the sum of $6,568.42, and has wrongfully failed and omitted to account therefor or to remit the same to the said company, and was indebted to the said company in that amount on the 5th day of September, 1891, for premiums collected by him and not accounted for or paid over to the said company as aforesaid.

V.—That, from September, 1887, to June, 1889, the plaintiff was employed by the said company as its manager and agent in the Republic of Chili, South America, and that, among the duties of the plaintiff, as such manager and agent, was that of collecting the premiums due on the policies issued by said company in said country, and to account for such premiums and to remit the same to the said company. That the plaintiff collected said premiums and, out of the premiums so collected during said period, has wrongfully kept and retained to his own use the sum of $5,792.29, and has wrongfully failed and omitted to account therefor or to remit the same to the said company, and was indebted to the said company in that amount on the 5th day of September, 1891, for premiums collected by him and

not accounted for or paid to the said company as 43
aforesaid.

VI.—That, from June, 1889, to September 5, 1891, the plaintiff was employed by the said company as general agent or manager of the said company in the Republic of Mexico, and that it was his duty, among others, to collect the premiums due on the policies issued by the said company in said country, and to account for such premiums and to remit the same to the said company. That the plaintiff collected said premiums and, out of the premiums so collected during said period, the plaintiff has wrongfully kept and retained to his own use the sum of $13.687.06, and has wrongfully failed and omitted to 44
account therefor or to remit the same to the said company, and was indebted to the said company in that amount on the 5th day of September, 1891, for premiums collected by him and not accounted for or paid over to the said company as aforesaid.

VII.—That, on or about the 6th day of March, 1891, the plaintiff, in the presence and company of one Merzbacher and one Dinkelspiel, at the bar of the Hoffman House, in the City of New York, stated that he had helped himself to the funds of the said company as aforesaid.

As a first defense to the second cause of action set 45
forth in the complaint:

VIII.—The defendant repeats and makes part of this defense the denials contained in paragraph I. of this answer, as if herein specifically reiterated and set forth, and the defendant denies each and every allegation contained in the paragraphs or subdivisions of said second cause of action numbered "First" and "Second."

46 As a second and separate defense to the second cause of action set forth in the complaint:

IX.—The defendant repeats and makes part of this defense the denials contained in paragraph I. of this answer, as if herein specifically reiterated and set forth, and the defendant denies each and every allegation contained in the paragraphs or subdivisions of said second cause of action numbered "First" and "Second," and alleges:

X.—That, since the year 1882, the plaintiff has been connected in business with, and employed in various capacities by, the New York Life Insurance Company, a domestic corporation, organized under
47 the laws of the State of New York, and carrying on business as a life insurance company. That, during the years 1882, 1883 and 1884, the plaintiff was employed as its agent in the Republic of Peru, South America, and during the years 1885, 1886 and 1887, as its agent in the Republic of Bolivia, South America. That, among the duties of the plaintiff, as such agent, was that of collecting the premiums due on the policies of insurance issued by the said company in said countries, and to account for such premiums, and to remit the same to said company. That the plaintiff collected said premiums, and out of the premiums so collected by the plaintiff during said years, the plaintiff has wrongfully
48 kept and retained to his own use the sum of $6,568.42, and has wrongfully failed and omitted to account therefor, or to remit the same to the said company, and was indebted to the said company in that amount on the 5th day of September, 1891, for premiums collected by him and not accounted for and paid over to the said company as aforesaid.

XI.—That, from September, 1887, to June, 1889, the plaintiff was employed by the said company as its manager and agent in the Republic of Chili, South America, and that, among the duties of the

plaintiff as such manager and agent, was that of collecting the premiums due on the policies of insurance issued by said company in said country, and to account for such premiums and to remit the same to said company. That the plaintiff collected said premiums, and out of the premiums so collected during said period, the plaintiff has wrongfully kept and retained to his own use the sum of $5,792.29, and has wrongfully failed and omitted to account therefor, or to remit the same to the said company, and was indebted to the said company in that amount on the 5th day of September, 1891, for premiums collected by him and not accounted for and paid over to the said company as aforesaid. 49

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XII.—That the plaintiff was not punished because of said facts, and subsequently and in or about June, 1889, was made the general agent of said company in the Republic of Mexico.

As a first defense to the third cause of action set forth in the complaint:

XIII.—The plaintiff repeats and makes part of this defense the denials contained in paragraph I. of this answer as if herein specifically reiterated and set forth, and the defendant denies each and every allegation contained in the paragraphs or subdivisions of said third cause of action numbered "First" and "Second." 51

As a second defense to the third cause of action set forth in the complaint:

XIV.—The plaintiff repeats and makes part of this defense the denials contained in paragraph I. of this answer, as if herein specifically reiterated and set forth, and the defendant denies each and every allegation contained in the paragraphs or subdivisions of the said third cause of action numbered "First" and "Second."

52 XV.—The defendant alleges that the character of the plaintiff is notoriously bad.

XVI.—That the New York Life Insurance Company is a domestic corporation organized and doing business under the laws of the State of New York as a mutual life insurance company; that the profits, or some part thereof, of the said company are, at stated intervals, divided among the persons holding policies therein; that since the year 1882, the plaintiff has been connected in business with and employed in various capacities by said New York Life Insurance Company; that during the years 1882, 1883 and 1884 the plaintiff was employed by said
53 company as its agent in the Republic of Peru, South America, and during the years 1885, 1886 and 1887 as its agent in the Republic of Bolivia, South America; that from September, 1887, to June, 1889, the plaintiff was employed by the said company as its manager and agent in the Republic of Chili, South America, and from June, 1889, to September 5, 1891, as general manager of the said company in the Republic of Mexico; that among the duties of the plaintiff in each of the aforesaid positions was that of soliciting and procuring persons to take out policies in the said company; that to induce persons to take out policies during all the years aforesaid, the plaintiff fraudulently overstated to them, or a great many of them, the amount of the
54 dividends that had in the past accrued and would in the future accrue, to such policy holders, and also fraudulently represented to them the benefits that would accrue to them by taking out such policies, stating such benefits to be of a more favorable nature to the policy holders than in reality they were, and thereby induced said persons to take out policies in said company.

XVII.—That it was also the duty of the plaintiff in each of said positions to collect the premiums due on the policies issued by the said company in each of

said countries, and to account for such premiums and to remit the same to said company; that the plaintiff collected said premiums in the years 1882, 1883 and 1884 in the Republic of Peru, South America, and out of the premiums so collected by him the plaintiff has wrongfully kept and retained to his own use the sum of $6,568.42, and has wrongfully failed and omitted to account therefor or to remit the same to the said company, and was indebted to said company in that amount on the 5th day of September, 1891, for premiums collected by him and not accounted for or paid over to the said company as collected as aforesaid; that from September, 1887, to June, 1889, the plaintiff collected the premiums due as aforesaid in the Republic of Chili, and, out of the premiums so collected, the plaintiff has wrongfully kept and retained to his own use the sum of $5,792.29, and has wrongfully failed and omitted to account therefor or to remit the same to the said company, and was indebted to said company in that amount on the 5th day of September, 1891, for premiums collected by him and not accounted for or paid over to the said company as aforesaid; that from June, 1889, to September 5, 1891, the plaintiff collected premiums due as aforesaid in the Republic of Mexico, and that out of the premiums so collected the plaintiff has wrongfully kept and retained to his own use the sum of $13,687.06, and has wrongfully failed and omitted to account therefor, or to remit the same to the said company, and was indebted to the said company, on the 5th day of September, 1891, in the said amount for premiums collected by him and not accounted for or paid over to the said company as aforesaid.

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As a first defense to the fourth cause of action set forth in the complaint:

XVIII.—The defendant repeats and makes part of this defense the denials contained in paragraph I. of the answer, as if herein specifically reiterated

58 and set forth, and the defendant denies each and every allegation contained in the paragraphs or subdivisions of said fourth cause of action numbered "First" and "Second."

As a second separate defense to the fourth cause of action:

XIX.—The defendant repeats and makes part of this defense the denials contained in paragraph I. of this answer, as if herein specifically reiterated and set forth, and the defendant denies each and every allegation contained in the paragraphs or subdivisions of said fourth cause of action numbered
59 "First" and "Second."

XX.—That The New York Life Insurance Company is a domestic corporation organized and doing business under the laws of the State of New York as a mutual life insurance company; that the profits, or some part thereof, of the said company are, at stated intervals, divided among the persons holding policies therein; that since the year 1882 the plaintiff has been connected in business with, and employed in various capacities by, said New York Life Insurance Company; that during the years 1882, 1883 and 1884 the plaintiff was employed by said company as its agent in the Republic of Peru, South America, and during the years 1885, 1886 and 1887
60 as its agent in the Republic of Bolivia, South America; that from September, 1887, to June, 1889, the plaintiff was employed by the said company as its successor and agent in the Republic of Chili, South America, and from June, 1889, to September 5, 1891, as general manager of the said company in the Republic of Mexico; that among the duties of the plaintiff in each of the aforesaid positions was that of soliciting and procuring persons to take out policies in the said company; that to induce persons to take out policies in said company during all the years aforesaid the plaintiff fraudulently

overstated to them the amount of the dividends that had in the past accrued and would in the future accrue to such policyholders, and also fraudulently represented to such persons the benefits that would accrue to them by taking out such policies, stating such benefits to be of a more favorable nature to the policyholders than in reality they were, and thereby induced said persons to take out policies in said company. 61

XXI.—That it was also the duty of the plaintiff in each of said positions to collect the premiums due on the policies issued by the said company in each of said countries, and to account for such premiums and remit the same to said company; that the plaintiff collected said premiums in the years 1882, 1883 and 1884 in the Republic of Peru, South America, and out of the premiums so collected by him the plaintiff has wrongfully kept and retained to his own use the sum of $6,568.42, and has wrongfully failed and omitted to account therefor or to remit the same to the said company, and was indebted to said company in that amount on the 5th day of September, 1891, for premiums collected by him and not accounted for or paid over to the said company as aforesaid; that from September, 1887, to June, 1889, the plaintiff collected the premiums due as aforesaid in the Republic of Chili, and out of the premiums so collected the plaintiff has wrongfully kept and retained to his own use the sum of $5,792.29, and has wrongfully failed and omitted to account therefor or to remit the same to the said company, and was indebted to said company in that amount on the 5th day of September, 1891, for premiums collected by him and not accounted for or paid over to said company as aforesaid; that from June, 1889, to September 5, 1891, the plaintiff collected premiums due as aforesaid in the Republic of Mexico, and that out of the premiums so collected the plaintiff has wrongfully kept and retained to his own use the sum of $13,687.06, and has wrongfully failed and 62 63

64 omitted to account therefor or to remit the same to the said company, and was indebted in that amount to the said company on the 5th day of September, 1891, for premiums collected by him and not accounted for or paid over to the said company as aforesaid.

XXII.—That on or about the 5th day of March, 1891, the plaintiff, in the presence and company of one Merzbacher and one Dinkelspiel, at the bar of the Hoffman House, in the City of New York, stated that he had helped himself to the funds of the said company as aforesaid.

65 As a partial defense to each and every one of the four separate causes of action set forth in the complaint and in mitigation of damages:

XXIII.—The defendant repeats and makes part of this defense the allegations, and each and every of them contained in the paragraphs or subdivisions of this answer numbered IV., V., VI., XVI., XVII. and XXII., as if herein specifically reiterated and set forth at large, and the defendant alleges that the character of the plaintiff is bad.

XXIV.—The defendant alleges that all of the facts herein set forth in mitigation of damages were known to the defendant prior to the 5th day of September, 1891.

66 Wherefore, the defendant demands judgment dismissing the complaint, with costs.

TOWNSEND, DYETT & EINSTEIN,
Attorneys for Defendant.
Office and Post Office address,
No. 247 Broadway,
New York City.

(Endorsed)—U. S. Circuit Court.—Sigismundo E. Halberstadt, Plaintiff, against Henry A. Morgan, Defendant.—Amended Answer.—Townsend, Dyett & Einstein, Attorneys for Defendant, 247 Broadway, New York.—To Robert H. Griffin, Attorney for Plaintiff.

At a Stated Term of the Circuit Court of 67
the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Tuesday, the 10th day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Present—The Honorable NATHANIEL SHIPMAN,
Circuit Judge.

SIGISMUNDO E. HALBERSTADT 68

vs.

HENRY A. MORGAN, as President of the *New York Times.*

Now comes the plaintiff by Robert Griffin, Esq., his attorney, and moves the trial of this cause. Likewise comes the defendant by Townsend, Dyett & Einstein, Esqs., his attorneys. Thereupon a jury is empaneled, and the cause proceeds to trial. After hearing the evidences of the parties, the argument of counsel and the instructions of the Court, on Thurs- 69
day, January 19, 1893, the jury retire, and on their return render a verdict whereby they find for the plaintiff in the amount of $15,000.$\frac{00}{100}$. It is ordered that the defendant have a stay of all proceedings on said verdict for forty-five days from January 19, 1893, within which to make and serve a bill of exceptions herein. It is further ordered, that no judgment be entered on said verdict before the settlement of the bill of exceptions.

(An Extract from the Minutes.)

JOHN A. SHIELDS,
Clerk.

70 U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SIGISMUNDO E. HALBERSTADT

vs.

HENRY A. MORGAN, President of the *New York Times*.

71 This action having duly come on for trial before the Hon. Nathaniel Shipman, Circuit Judge, and a jury, on the 10th day of January, 1893, and the jury on the 19th day of January, 1893, having rendered a verdict in favor of plaintiff and against defendant for the sum of $15,000, and the costs herein having been taxed in the sum of $44.95, and interest on said verdict amounting to the sum of $132.50, said sums in the agreggate amounting to $15,177$\frac{45}{100}$ now, on motion of Robert H. Griffin, attorney for plaintiff, it is

Ordered and adjudged, that Sigismundo E. Halberstadt, plaintiff, recover of and from Henry A. Morgan, President of the *New York Times*, defendant, the sum of $15,177$\frac{45}{100}$, damages and costs, and
72 that he have execution for the same.

Judgment signed this 13th day of March, A. D. 1893.

JOHN A. SHIELDS,
Clerk.

(Endorsed)—U. S. Circuit Court, South. Dist. N. Y. —Sigismundo E. Halberstadt *vs.* Henry A.. Morgan, President of the *New York Times*.—Judgment.—U. S. Circuit Court.—Filed Mar. 13, 1893, 3:50 P. M.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES, 73

SOUTHERN DISTRICT OF NEW YORK.

SIGISMUNDO E. HALBERSTADT

AGAINST

HENRY A. MORGAN, President of the *New York Times*.

BILL OF EXCEPTIONS. 74

APPEARANCES:

For Plaintiff—ROBERT G. INGERSOLL and ROBERT H. GRIFFIN.
For Defendant—B. F. EINSTEIN and HENRY YONGE.

The issues made by the pleadings herein came on for trial on the 10th day of January, 1893, before the Hon. Nathaniel Shipman and a jury.

Mr. Ingersoll opens for the plaintiff, and offers in evidence certificate of the *New York Times*, a joint stock association, under the Laws of 1885, filed in the office of the Clerk of the City and County of 75 New York, January 9, 1891.

Counsel for defendant admits that said paper comes from the file of the County Clerk's office, but objects to its introduction in evidence as irrelevant.

Objection overruled. Exception by defendant.

Said paper is marked Plaintiff's Exhibit A, and is read in evidence as follows:

"Certificate filed by The *New York Times*, a joint stock association, under the Law of 1885, Chapter 505.

76 "1. Name of association,—The *New York Times*.

"2. Date of its organization,—August 5, 1851.

"3. Laws or statute under which it is organized and does business,—No special law or statute or any general law; common law association.

"4. Number of associates required thereby,—Seven.

"5. Number of associates of The *New York Times*,—Seven.

77 "6. Its principal place of business,—City of New York.

"7. Names and places of residence of its officers,—Henry A. Morgan, President, residing at Aurora, County of Cayuga, State of New York. George Jones, Secretary and Treasurer, residing at City of New York.

"Dated at the City of New York, January 6, 1891.

(Signed) HENRY A. MORGAN,
President.
GEORGE JONES,
Treasurer."

78 "City and County of New York, ss.:

HENRY A. MORGAN, being duly sworn, says: That he is the President of the Joint Stock Association, The *New York Times*, and that the foregoing certificate is true.

HENRY A. MORGAN.

Sworn to before me }
January 7, 1891. }
E. W. MOSHER,
Notary Public,
City and County of New York."

"City and County of New York, ss.: 79

GEORGE JONES, being duly sworn, deposes and says: He is Treasurer of the Joint Stock Association, the *New York Times*, and that the foregoing certificate is true.

GEORGE JONES.

"Sworn to before me
January 8, 1891.
EUGENE C. MAUBORGNE,
Notary Public,
New York."

"Filed and recorded 9th January, 1891, 12 hours 10 minutes."

80

Counsel for plaintiff moves to so amend the fifth paragraph of the complaint that it shall read as follows:

FIFTH.—That on the fifth day of September, 1891, the defendant, the said joint stock association known as and for the *New York Times*, of which the said Henry A. Morgan was and is president, maliciously published in the said *New York Times*," &c.

And to similarly amend the several averments of the complaint under each cause of action, by inserting after the word "defendant," the words "the said joint stock association known as and for the *New York Times*, of which said Henry A. Morgan 81
was and is president."

Counsel for defendant objects to the several amendments as in effect introducing a new party to the action.

Motion granted. Exception by defendant.

Counsel for defendant reserves the right to move to amend the answer, and counsel for plaintiff waives service of proposed amendments.

82 GILBERT EDWARD JONES, sworn and examined as a witness for plaintiff:

By Mr. Ingersoll:

Q. Are you the secretary of the New York Times Association? A. I am treasurer.

Q. In what business is that association engaged?

Objected to on the ground that the witness is privileged from answering, the object of the question being to try to prove the publication of a libel, and the witness, being a shareholder in the New York Times Association, is privileged from answering.

83 By Mr. Einstein:

Q. Were you a shareholder in the *New York Times* on September 5, 1891? A. I was.

Q. And you are still a shareholder? A. I am.

Q. And have been since that time? A. Yes.

Mr. Ingersoll states that he is not trying to prove the publication of a libel, but is trying to prove in what business the association is engaged.

Question allowed. Exception by defendant.

By Mr. Ingersoll:

Q. In what business is the New York Times Association engaged?

84

Mr. Einstein asks the Court to instruct the witness that if his answer to that question will tend to criminate him he has the right to refuse to answer.

The Court: I do not think it will tend to criminate the witness. He may answer.

Exception by defendant.

A. Publishing a newspaper.

Q. What is the name of that paper?

Mr. Einstein objects to the question, and requests the Court to give the same instruction.

Question allowed. Exception by defendant.

A. The *New York Times.* 85

Q. Where is the place of business? A. New York City; at Park row and Spruce street, in the building known as "The Times Building.

Q. Has the paper been published for several years?

Same objection and request for instruction made by Mr. Einstein.

Question allowed. Exception by defendant.

A. Yes. The circulation of the *Times* is fairly large in the United States. I suppose it also goes to foreign countries. I cannot tell if it goes to Mexico.

Q. How long have you been acquainted with this 86
association called the *New York Times?* A. More than twenty years.

Q. Did it discontinue the publication of the paper during any one year that you have known it?

Objected to on the same ground.

The Court: By the word "during" do you mean throughout the year?

Mr. Ingersoll: I mean at any time during the year. Did he know of the discontinuance of the paper at any time since he has known it?

The Court: I will allow that question.

Mr. Einstein: I ask the witness to assert his privilege.

87

The Court: I instruct him that that question does not intend to criminate him.

Mr. Einstein: The witness does assert his privilege; and your Honor does direct him to answer?

The Court: Yes.

Exception by defendant.

The Witness: What is the question.

Mr. Ingersoll: Did the association known as the *New York Times* discontinue the publication of the paper at any time since you have known it?

The Witness: Not that I know of.

88 Mr. Ingersoll: I offer in evidence what purports to be a copy of the *New York Times*, headed, "*The New York Times*, Saturday, September 5, 1891. Price two cents." And on the top of each page are the words "*The New York Times*, Saturday, September 5, 1891. Price two cents."

Mr. Einstein: I object to that as incompetent and immaterial. There is no evidence that this paper which is now offered in evidence was printed or published by the New York Times Association; and the paper itself is immaterial and irrelevant.

Mr. Ingersoll: I want to introduce it in evidence for the purpose of reading from it one of the articles complained of, and of which they admit the publica-
89 tion in their answer.

Objection overruled. Exception by defendant.

Said paper is marked "Plaintiff's Exhibit B."

Mr. Ingersoll: I offer in evidence, first as to its identity, the heading, "*New York Times*, New York, Saturday, September 5, 1891. Volume XL., No. 12,489. Price two cents." And I offer the same heading on every page, to wit: "*The New York Times*, Saturday, September 5, 1891." I wish to read to the jury from page 8, the portion of an article set forth in the complaint, and complained of
90 as libellous in this case; and I offer that portion in evidence:

"This is the situation in the Beers' Mutual Admiration Society at Broadway and Leonard street. Everything is done to avoid publicity and to screen the truth. Not one of the twenty men composing the Board of Trustees, save those two or three who hold executive offices, knew of the Merzbacher defalcation until the *Times* exposed it. Not one of those men, these alleged guardians of trust funds, knows that Halberstadt, Beers' Mexican agent, is short in his accounts $28,000, and yet this same Halberstadt, while standing in the barroom of the

Hoffman House early last March, surrounded by such men as Merzbacher and Dinkelspiel, boasted of the manner in which he was helping himself to the company's funds." 91

I now offer in evidence another copy of the *New York Times*, Vol. XLI., No. 12,310, with the heading, "New York, Wednesday, September 30, 1891;" and I read in evidence part of an article on page 8, in the fifth column from the left hand side, as follows:

Same objection, same ruling and exception by defendant.

Marked "Plaintiff's Exhibit C."

92

"These agents, or one of them at least, owed his appointment to the defaulter Merzbacher. Their shortage was found to be $60,000. Neither of them was arrested. The case of the intemperate German agent who was found to be short in his accounts $12,000 in Chili and who was subsequently transferred to Mexico is another familiar story. This agent was not only not punished, but he was transferred to another agency."

I next offer in evidence a copy of what purports to be a copy of the *New York Times*, dated "New York, Saturday, October 10, 1891, Vol. XLI., No. 12,519," and I read in evidence from this paper a part of an article on page 8, in the first column, as follows: 93

Same objection, same ruling and exception by defendant.

Marked Exhibit D for Plaintiff.

"The notoriously bad character of the agents whom Mr. Beers employed to do the work of the New York Life Insurance Company is a theme that constantly presents new features and new attractions. Dinkelspiel, Merzbacher, Webber, Stoddard,

94 Moore, Halberstadt, Davis and Vanuxem are names that stand at the head of the list of Mr. Beers' warm personal friends and admirers, and to each of these men he has given valuable appointments with unlimited opportunities to swindle and deceive the policyholders. The readers of the *Times* are entirely familiar with the methods and the extent to which the agents named have availed themselves of those opportunities."

I offer in evidence another copy of the *New York Times*, dated "New York, Sunday, November 1, 1891, Vol. XLI., No. 12,537, price five cents." The part I wish to read is upon page 3.

95 Same objection, same ruling. Exception by defendant.

Said paper is marked Plaintiff's Exhibit E.

"Since the present feeling of distrust of the company's management arose, efforts have been made to enlighten a deceived lot of policyholders concerning the abuses of various sorts committed by Messrs. Beers, Merzbacher, Dinkelspiel, Sanchez and others, but notwithstanding all that has been said, it is evident to those who, like myself, are acquainted with the management of the Spanish-American Department, that there are details of an important nature lacking. It is a fact that the most immoral methods
96 of doing business prevail in that department, and that the arch conspirator who, next to Beers, is responsible for these immoralities, is Sanchez himself. * * * He and his sub-agents have made use of all sorts of exaggerations and deceits in Spanish-America, where the insurance public is completely ignorant of life insurance, and where the most improbable stories as to conditions of policies and the results that will accrue from them may be told with perfect safety. * * * S. E. Halberstadt is another one of the company's agents to whom attention must be drawn if the company's affairs in Spanish-America are to be thoroughly

exposed. This man is said to have been a 97
defaulter while in the employ of the New York Life in Peru and Chili. He had been for some years the company's representative in Mexico, where his accounts have steadily run in arrears, as he himself boasted one night at the Hoffman House in this city. The entire staff of the Spanish-American Department have been witnesses to the scandalous quarrels that took place between Merzbacher and Halberstadt in the former's private office in this city. One of the most remarkable things about this man's career is the freedom with which he talks about the officers of the company, notably President Beers and his son-in-law, Berthelot. Halberstadt was a candidate for Merzbacher's position, but he 98
has not obtained it yet. Another agent who has stolen the company's money in Spanish America was until very recently manager at Buenos Ayres."

SIGISMUNDO E. HALBERSTADT, plaintiff, is sworn and examined as a witness in his own behalf:

By Mr. Ingersoll:

My name is Sigismundo Ernesto Halberstadt. I am the plaintiff in this case. I am a citizen or subject of Denmark. I was born there and have never been naturalized or taken out citizenship in any other country.

Mr. Ingersoll: I wish to put in evidence the an- 99
swer of the defendant in this case, and so much of each answer to each cause of action as admits that the plaintiff has been connected in business with and employed in various capacities by the New York Life insurance Company, as it admits or avers,—a domestic corporation under the laws of the State of New York, carrying on business as a life insurance company. Also the averment that during the year 1884 and since, the plaintiff was employed by that company in Peru. Also the averment that he was employed by the company in Bolivia, South America. Also the admission or averment that

100 from September, 1887, to June, 1889, the plaintiff was employed by that company as its manager or agent in the Republic of Chili, South America. Also, that from 1889 to September, 1891, the plaintiff was employed by that company as general agent or manager in the Republic of Mexico. And so as to each one of the defenses, to that extent, and no more,—for the purpose of showing simply the employment of the plaintiff by the New York Life Insurance Company, and that he was engaged as set forth in his complaint in that business.

I call attention to the fact that the third and fourth paragraphs of the complaint, in the first cause of action stated, are not denied, and are,
101 therefore, admitted by the defendant, as follows:

"That since the year 1884 the plaintiff has been connected in business with and employed in various capacities by the New York Life Insurance Company, a domestic corporation," &c. There is no need of my reading it all. I only offer so much of the answer as admits the employment.

ROBERT H. GRIFFIN, sworn and examined as a witness for the plaintiff:

By Mr. Ingersoll:

Q. Will you look at the copies of the *New York Times* which have been offered in evidence and state,
102 if you know, where they were obtained, or how they were obtained? A. I do know how and where they were obtained. I bought those papers before this action was brought against the New York Life Insurance Company.

Q. Where did you buy them? A. At the office of the *New York Times*, at the juncture of Park row and Nassau street, in this city; I bought them personally.

[PLAINTIFF RESTS.]

Mr. Yonge opens the case for the defendant. 103

Mr. Einstein read in evidence from the complaint, as follows:

"That since the year 1884 the plaintiff has been connected in business with and employed in various capacities by the New York Life Insurance Company, a domestic corporation; that is to say, during the year 1884 as soliciting agent for the said company in the Republic of Peru, South America; in 1885, to and including the year 1887, in the Republic of Bolivia, South America, in there establishing and promoting the business of the said company, this plaintiff, during the last year of his employment in Bolivia, acting as sub-agent general for the 104
said company; from September, 1887, to June, 1889, as assistant manager of the said company in the Republic of Chili, South America; and from October, 1889, until the present time as manager of the said company's business in the Republic of Mexico, his duties in the various capacities aforesaid being, amongst others, to collect premiums due on the policies issued by the said company in the said countries and to remit such premiums to said company."

I also offer in evidence the contract signed between Mr. Sanchez and Mr. Halberstadt, the plaintiff, dated at Paris, September 2, 1889, and the contract signed 105
between the same parties at the City of New York, June 20, 1890.

Received in evidence, and marked Defendant's Exhibit 1.

Mr. Einstein: I call for the production of a letter delivered to the plaintiff by Mr. Sanchez in June, 1890, of which notice to produce has been given.

Mr. Ingersoll: Mr. Halberstadt says that he does not recollect receiving such a letter. We do not say that there is no such letter, but we say that we have

106 no recollection of having received such a letter, and that we have no such letter.

JUSTUS WALLERSTEIN, sworn and examined as a witness for defendant.

By Mr. Einstein:

Q. Have you seen the original of which this letter is a copy? A. I have.

Said letter is marked Defendant's Exhibit 2 for identification.

I was not present when it was signed, but it bore the signature of Mr. Halberstadt.

107 Q. Is this letter which has been marked Exhibit 2 for identification a copy of that letter? A. I think this is a copy of the copy. It is a copy of the original.

Said letter Exhibit 2 for identification is offered in evidence.

By Mr. Ingersoll:

I saw the original of this letter in Barcelona, in June or July of last year. The original letter was on file in the office of the Spanish-American Department of the New York Life Insurance Company. I mean the original letter which was addressed to Mr. Halberstadt, and which bore the signature of

108 Mr. Halberstadt. It was a letter addressed to Halberstadt, signed by Mr. Sanchez and Mr. Halberstadt. I saw it first in November last.

Q. Who did this typewriting? A. One of the clerks in the Barcelona office. I was there at the office at the time it was copied.

Q. What did you mean when you said that this was a copy of the copy? A. The original letter was sent to our representative to Mexico, and a copy was retained in the office at Barcelona.

Said letter is offered in evidence by Mr. Einstein. Objected to by Mr. Ingersoll on the

ground that there is no evidence that any such letter was ever sent. 109

By the Court:

Q. Did you ever see the original letter which Mr. Sanchez told his clerk to copy? A. Yes.

Q. Where? A. In Barcelona before it was sent to Mexico.

Q. Do you know of your own knowledge, from your inspection of that original, that this paper is a copy of the original? A. I compared the letters. There may be clerical errors. I compared the letters, or had them compared by another clerk. They have been twice compared.

Q. You do not quite understand me. You saw 110 the original before it went to Mexico—the original letter, signed by Sanchez, before it went to Mexico, did you? A. Yes.

Q. How do you know of your own knowledge that this is a copy of the original letter? A. I was in the office in Barcelona when the copy of the original letter was taken. I was in charge of the Barcelona office then. Mr. Sanchez then was present. It was made under his direction; as he wanted to send the original to Mexico. It was my duty to compare, and have compared by a clerk, to see if the copies are exact.

Q. Did you so compare? A. I did compare—had them compared. 111

By Mr. Ingersoll:

Q. Did you have it compared, or did you compare it personally? A. I gave it to a clerk to compare, and afterwards took all the copies that were sent to Mexico and read them over myself.

Q. Where were you on the 18th of June, 1890? A. I was on my way from Panama to England—on the sea.

Q. Did you compare this copy with the copy from which it was copied? A. Yes; that I am sure of.

112 Q. You did that yourself? A. Yes; because that copy was for me. I took that for myself. So I compared this copy myself.

Q. How did you come to take this copy? A. I need those copies. I have copies of all contracts in our department in our possession.

Q. So you say that you personally compared this copy with the copy from which it was copied? A. Yes.

Q. Do you say that you personally compared the copy, from which this was copied, with the original? A. I believe I did.

Q. Have you any recollection of it? A. The recollection I have is that I have seen the original; that I
113 have seen the copy and I have seen that letter.

Q. Is it your recollection that you personally compared the copy from which this was copied with the original, or have you any recollection about it? A. I believe I did. I believe I have a recollection. I have seen the letter——

Q. I understand that you saw the letter, but that is not the point. The question is, did you compare the copy from which this was copied with the original letter itself? Have you any remembrance of having it in your hands and comparing it? A. I believe that I did.

By the Court:

114 Q. Did you examine the original letter? A. I did.

Q. From your examination and your memory of that original letter, what do you say in regard to the thoroughness of the comparison and the genuineness of this copy which you have here? A. I say that I know the contents of the original letter. I have seen it and know the contents of it, and I believe that this is an exact copy of that original letter.

By Mr. Ingersoll:

Q. Was there an office of the Spanish-American Department in Barcelona in 1890? A. There was not.

Q. This original letter, as I understand you, must have been sent by you after it had been returned by Mr. Halberstadt to the company? A. I do not know. In such cases or very often there are two letters; in most cases or nearly always there are two letters written,—for each party one letter,—and they are both signed by the persons. 115

Q. Did you understand that this letter was approved by Mr. Halberstadt before it was sent to Mr. Halberstadt? A. I don't know if Halberstadt was then exactly with Mr. Sanchez or if it was sent I do not know.

Q. Here is a letter or copy of a letter which was apparently sent to Mr. Halberstadt? A. Not necessarily. 116

Q. And signed by Mr. Halberstadt as approving the contents. Now do you know whether Halberstadt was present at that time? A. I do not, but if I am not mistaken he was at that time in New York and Mr. Sanchez too.

Q. Don't you think this was in New York where the letter was written? A. I believe it was, but can't say.

Q. You have not the original with you? A. No; the original, as far as I know, is in Mexico.

Mr. Einstein again offers the letter in evidence.

Received in evidence and marked Defendant's Exhibit 2. Exception by plaintiff. 117

By Mr. Einstein:

A. I am attorney of Mr. Sanchez, the general manager of the Spanish-American Department of the New York Life Insurance Company. I mean that I am his attorney in fact. I have occupied that relation to Mr. Sanchez since July, 1891.

Q. Where have you been located since that time? A. Since 1891 always in Barcelona. Prior to July, 1892, I was inspector of accounts for the Spanish-American Department of the New York Life In-

118 surance Company, traveling in South America. My duties were to visit the general agencies, to examine the books and accounts and report to the head office in New York; not to the company, but to the Spanish-American Department of the home office The home office of the Spanish-American Department was then in New York.

Q. What have been your duties as attorney in fact for Mr. Sanchez since July, 1891? A. When Mr. Sanchez was absent from Barcelona I remained in charge of the office together with another attorney. I had charge of the head office of the Spanish-American Department. I know Mr. Halberstadt, the plaintiff in this action. I believe I have
119 known Mr. Halberstadt since December, 1887. I then got acquainted with him. He was then agent for Mr. Fesser, who was general agent in Chili. Mr. Fesser was Colonel Dickinson's agent. Colonel Dickinson was then the general agent for South America, Mexico, Central America and the West Indies for the New York Life Insurance Company. I am familiar with most of the business of the Spanish-American Department of the New York Life Insurance Company and all the office business of the head office, and with most of the business in our departments in South America and the West Indies. It was part of my business to familiarize myself with those matters.

120 Q. I show you a paper which has been marked Defendant's Exhibit 2. It is a letter directed by Mr. Sanchez to Mr. Halberstadt, and which was marked "approved" by Mr. Halberstadt. I call your attention to this provision in this letter:

"Having proved to you conclusively that you had no authority to open in the books of the subdepartments of Mexico an account denominated Furniture Account, it is understood that you are not allowed to reopen in future in said books accounts of this nature, or any other accounts that are to be liquidated by the carrying over to your personal account, or to that of profit and loss, the

balances which they may show at the end of each 121
one year, unless authorized to do so by the Spanish-American Department."

Will you be kind enough, if you know, to explain that provision?

Objected to.

Q. In the first place, do you know what that transaction was? A. I know.

Q. Tell us what you know? A. I was not in Mexico when the thing occurred, nor at the general office; but I am familiar with all the correspondence at that time, and besides, Mr. Sanchez has spoken about that matter with me, and from that I have my knowledge.

122

Q. Have you the knowledge from the books of the Spanish-American Department?

The Court: I will permit the witness to state his knowledge in regard to that furniture account.

Mr. Einstein: As obtained by him from the books of the Spanish-American Department, and from the correspondence in that department?

The Court: We will first hear what he has to say with regard to that.

By Mr. Einstein:

Q. What do you know about this furniture account? A. In the beginning of 1890, Mr. Halberstadt took a certain amount of money, with which he bought some furniture.

123

Objected to.

By Mr. Ingersoll:

Q. State what you know from the books, and where you saw the books? A. From the books I know the fact that a certain amount has been charged on the books of the Mexico office to an account called "Furniture Account," and that to this charge the head office of the Spanish-American Department objected, on the ground that Mr. Halberstadt had no authority to spend that money for that

124 purpose; and that he should refund that money. The furniture that was in this furniture account was not for the company's office. I do not know for whom it was bought.

Q. Do you know from the books of the company, or from the correspondence in the office of the company, where this furniture went which was charged against the Spanish-American Department? A. From the the correspondence I only know that that furniture was not for the office; was not for the interest of the New York Life Insurance Company, but where it went, I do not know.

Q. Is Mr. Halberstadt a married man? A. He is married. He was living at the time this charge
125 was made in the City of Mexico. The amount of this furniture account, I believe, was about $3,500 in Mexican silver. I am not sure about that.

Q. Have you any information from the Spanish-American Department either from its books or from correspondence in that department between Mr. Halberstadt and that department, that this particular furniture went into his private house in Mexico, and not into the office of the Spanish-American Department? A. I do not recollect if the information I have about that is through the correspondence, or if it has been told to me by the Spanish-American Department; I do not recollect.

Q. Have you any information from any source as
126 to where this furniture went? A. Yes, sir.

Q. From what source did you get that information? A. I have either read it in the correspondence or it has been told to me by Mr. Sanchez.

Q. But do you not recollect now which it was? A. I do not recollect which.

Q. What is your information about the furniture?

Objected to and excluded as incompetent. Exception by defendant.

Q. Did you not inform me, before you went upon the stand, that you had the information that this

furniture went to his private house, and not into the office of the company? 127

Objected to and excluded as incompetent. Exception by defendant.

On September 5, 1891, Halberstadt owed the Spanish-American Department about $15,000.

Q. Did he then owe these items which are mentioned in this contract of June 20, 1890, and which was supplementary to the contract of September 2, 1889? A. He owed the greater part of it. He owed a part of it.

Q. How much of it had been paid off? A. Out of that amount which is mentioned in that amendment he yet owed about $10,000—$10,000 of the sum 128 of $12,000 which is mentioned in the amendment to the contract.

Q. But there is more than $12,000 mentioned in this contract. There is $12,360 mentioned as owing to the sub-department of Chili, and there is $5,209 mentioned as owing to the sub-department of Mexico. That would make $17,500. I want to know how much of that $17,500 he owed to the Spanish-American Department on the 5th of September, 1891? A. About $5,000. Without referring to the books I cannot give any information.

Q. I am not asking about the $5,000. In this contract of June 20, 1890, Mr. Halberstadt admits that he owes the Spanish-American Department $17,500, 129 "which shall be credited to his account against the sums which he owes to the sub-department of Mexico as well as to the sub department of Chili, which are as follows." Those are the words in this contract by which he admitted at that time that he owed those departments $17,500; and since that he has owed them a great deal more. By this contract Mr. Halberstadt admitted that he owed $17,500 to the Spanish-American Department, of which $12,360 he owed to the sub-department of Chili, and $5,000 to the department of Mexico. Now, I want to know from you how much of that $17,500

130 was owing by Mr. Halberstadt on September 5, 1891? A. I can give information only about the $12,000. I cannot give any information about the $5,000, not having examined the Mexican books.

Q. Then you do not know whether or not he paid any of that? A. I do not know if in that year he paid any of that, but if anything was still pending to be credited to his account, I cannot give the information about that. I say that about $2,000 had been paid on the $12,000 owing on the Chili account.

Q. Do you know of any charge that was made by Mr. Halberstadt against the Spanish-American Department for loans amounting to $2,000 or there-
131 abouts; do you know anything about that account? A. I know something about that; yes.

Q. What do you know about it? A. I know that the representative of the Spanish-American Department who was sent to Mexico to examine these books reported—(Objected to). There is no record in the Spanish-American Department of that account.

Q. Is there any correspondence in the Spanish-American account in relation to that transaction? A. There is some correspondence.

Q. Where is this correspondence? A. In Mexico and Barcelona.

Q. Do you know the account of Mr. Pazos? Do
132 you know such an account as that? A. I do.

Q. Is that an account in the Spanish-American books? A. It is an account in the Mexican office books; in the sub-department of Mexico.

Q. Do you know the facts connected with that account? A. I do. Mr. Pazos was the sub-manager of the sub-department of Mexico. Mr. Halberstadt was at that time the manager. Mr. Pazos had a contract, according to which he was entitled to draw certain amounts every month. Mr. Halberstadt, in accordance with his contract, was obliged to forward every month to the head office in Barcelona (which was then under my charge) press copies of

his journal, of his monthly balance sheet and other documents; and from these documents and from correspondence I have my information. They were forwarded every month. They came to us every month. We had these documents in Barcelona. 133

By the Court:

Q. You have examined those accounts? A. I examined those accounts.

Q. What did the accounts show with regard to the Pazos account? A. That Mr. Pazos received more money than he was entitled to—than they should have paid him; more than the monthly allowance which was stipulated in the contract. 134

By Mr. Einstein:

Q. And the amount that he was paid in excess of that to which he was entitled was charged by Halberstadt against the Spanish-American Department, is that it? A. No; it was charged against Mr. Pazos.

Q. Who paid the money to Mr. Pazos? A. That I am unable to say. I was not there.

Q. How does it appear by the accounts which were rendered to have been paid? A. The overpaid which Mr. Halberstadt, as manager of the sub-department of Mexico, is responsible.

By the Court: 135

Q. Do you know by whose direct and immediate authority that money in excess of the proper amount was paid to him? A. I do not.

By Mr. Einstein:

Q. Did this overpayment of Mr. Pazos appear in Mr. Halberstadt's account that was rendered by him to the Spanish American Department? A. Mr. Halberstadt personally never rendered any accounts.

The sub-department of Mexico sent press copies of balance sheets, which mostly, I believe, every time

136 had the signature of Mr. Halberstadt, to the accountant at Barcelona. On those balance sheets it appeared that Mr. Pazos received more money than he should have received.

Q. From what source did Mr. Pazos receive his money for those overpayments? A. Through the Mexican office.

Q. I want to know what moneys were in the hands of the Mexican Department from which they paid Mr. Pazos this amount of money? A. The funds were funds of the Spanish-American Department of the New York Life Insurance Company.

Q. Where did those funds come from? A. From premiums collected on policies issued by the New
137 York Life Insurance Company.

Q. Now, about these loans made to "sundries," which appear in this account which I have in my hand. I want to know from you if you have any information which you derived from the Mexican Department or from the South American Department, in relation to charges that were made by Mr. Halberstadt against the department for loans that he had made to outside people, or to people not connected with the agency at all Have you any such information? A. I have.

Q. Where did you get that information? A. From the inspector whom we have sent to Mexico.

Q. Did any information in connection with those
138 accounts or in relation to those accounts, appear in any statement made by Mr. Halberstadt to the department; did Mr. Halberstadt in his monthly statements to the department say anything about those loans? A. They appear in the monthly balance sheet which was forwarded to Barcelona.

Q. In what way did they appear? A. They appeared as money owed by those parties who were named in the account.

Q. Were the persons named in the statement, to whom these advances were made, connected with the department? A. Not so far as I know. I cannot tell the names without referring to the books.

Q. Did you at the time you made this investiga- 139
tion endeavor to ascertain whether those people were connected with the department or not? A. To ascertain that I am now on my way to Mexico. I do not know. I am going to Mexico to examine the books and find out about this—to investigate this and other things. I do not know the amount of those loans.

Q. When were those loans made as appears by the accounts? A. During the time that Mr. Halberstadt was manager of the sub-department of Mexico. From September 1, 1889, until August 31, 1892. The furniture account was prior to September 1, 1891. I do not know how much Mr. Halberstadt now owes the Spanish-American Department. 140

Q. About how much? A. I cannot tell until I examine the books in Mexico. I could not tell in the neighborhood of $10,000 until I make the examination.

Q. Is it as much as $40,000? A. I cannot tell. I do not know.

Q. Don't you recollect writing a letter from Barcelona about November 3, 1892, in which you said that Mr. Halberstadt owed the company about $30,000?

Objected to as incompetent and immaterial.

The Court: I think he can refresh the recollection of the witness by showing him a letter or 141
calling his attention to a letter which he sent.

Q. Do you recollect writing such a letter as that? A. Yes.

Q. Do you recollect saying that in the letter? A. I recollect saying that in a letter.

Q. Was not that true at the time? A. I had not been in Mexico and I cannot tell. This I reported from Barcelona. It was my opinion which I gave to the company. I am going now to Mexico to verify, to see about it.

Q. But you must have examined some books to

142 find out whether he owed the company $30,000 or not? A, Of course I did.

Q. Do you recollect an item of charge against Mr. Halberstadt for an amount drawn by him in excess of his guarantee? A. I do. That charge was made in the books, in the Mexico books. I know about how much it was.

By the Court:

Q. Who kept those books in Mexico? A. The bookkeeper of the Mexico office.

Q. And your examination of the books that were kept in Mexico showed you that Mr. Halberstadt had overdrawn his guaranteed account? A. Not the
143 books which were kept in Mexico, I was not in Mexico; but the monthly statements sent by the Mexico office which bore the signature of Mr. Halberstadt and which were forwarded to Barcelona. An examination of those statements showed that Mr. Halberstadt had overdrawn.

Q. And those statements bore the signature of Halberstadt? A. The signature of Halberstadt and of the accountant of the office.

By Mr. Einstein:

Q. Then tell us about how much? A. I know of about $4,000 or $5,000.

Q. Do you know whether or not he had made any
144 advances to agents in excess of the amount allowed by the contract? A. I do know and can state how much was overdrawn or advanced in excess of the amount.

By the Court:

Q. How much was advanced to agents? A. On August 31, 1892, when Mr. Halberstadt's account expired, the advances to agents amounted to about $23,000. Mexican silver—more or less. It was probably advanced during the entire duration of the contract—more than two years; but not the entire $23,000.

CROSS-EXAMINATION by Mr. Ingersoll: 145

Q. Were you in any way connected with the Mexican Department at the time Mr. Halberstadt, was down there? A. I am connected with all the departments. I am connected with the Spanish American Department, which comprises the whole of South America, Mexico, West Indies and Central America. I was connected with an office that Mr. Halberstadt had in Chili. I was with Mr. Halberstadt in Chili on several occasions. On one occasion for about four months, and on another occasion for about five months. At one period I was acting as accountant. At another period I was inspector of accounts for the department. It was my duty to go to the various offices and see that the business was 146 done correctly and properly, and from time to time make reports.

Q. When were you first acquainted with the business of Mr. Halberstadt? I was first acquainted in December, 1887; but then it was my duty to examine the previous books. I knew something of what he was doing in 1887, and something of what he was doing in 1888 and 1889, and in 1890, 1891 and 1892.

Q. You have stated about the accounts that were sent from time to time to Barcelona—the accounts that you looked over; did those accounts include those of a man by the name of Pazos and others? A. Yes.

Q. Do you say to the jury that at that time you saw 147 anything in the accounts tending to show that Mr. Halberstadt was dishonest; just tell it right out if you did? A. Do I have to answer this question?

Q. I want you to answer it if you know or if you saw anything in the accounts that tended to show to you that Mr. Halberstadt was dishonest, that he was misappropriating funds of the company? A. I have not yet examined those accounts which would allow me to form an opinion.

Q. Was there anything in those accounts about which you have testified, that at the times raised the suspicion in your mind that Mr. Halberstadt was

148 dishonest? A. There was nothing which would allow me to say that here.

Q. Will you look at this letter and see if you wrote it and signed it? A. I signed the letter. I do not know whether it was dictated by me, or by the other attorney; but I did sign it.

Q. And was it true, as you believed? A. It is a circular letter which was sent——

Q. That is not what I am asking you. Was it true, as you believed? A. No; it is not.

Q. Did you write it, knowing it was a lie? A. I had no—I could not act in my personal--it was not a personal letter of mine. I was not asked my personal opinion. It was a letter from the office in
149 Barcelona to Halberstadt.

Q. The letter reads as follows:

"S. E. HALBERSTADT, Esq., Manager, Mexico:

"The end of the present year drawing near"—it is dated December 29, 1891—"we beg to tender you our sincere thanks for your valuable assistance during its course in obtaining satisfactory results in our department. Your endeavors are highly appreciated, and we sincerely trust that, during 1892, you will continue the same. We would like to obtain during the coming year with regard to new business a result surpassing that of any preceding year, and we count upon your valuable assistance in reaching that end. We wish you a happy and prosperous
150 new year, and beg to remain, dear sir,

Very truly yours,

SPANISH-AMERICAN DEPARTMENT OF NEW YORK LIFE INS. CO.,

pp. J. SANCHEZ, General Manager.

A. DARLOT,

J. WALLERSTEIN."

That is your signature? A. Yes.

Q. You were called upon, I believe, to state with regard to some accounts transmitted by Mr. Halberstadt, which showed, or tended to show, that a man by the name of Pazos had received more than his

contract salary, as you understood it. Was that be- 151
fore the 29th of December, 1891? A. No. I believe that it was only lately that I became aware of the fact. That is, after he had left the company's service.

Q. Then this letter, or this report that you testified to with regard to Pazos having received more money than he was entitled to under the contract, was after Halberstadt had left the service of the company? A. The report which we received. Yes.

The letter above quoted is offered in evidence and marked Plaintiff's Exhibit F.

Q. I now show you a letter (marked Exhibit G for identification) and ask you whether the signature to 152
that letter was written by Sanchez, the general manager of the Spanish-American Department. Are you acquainted with the handwriting of Mr. Sanchez? A. I am.

Q. Is that his signature? A. As far as I know, it is.

Q. I show you a letter marked Exhibit H for identification. See if that is also signed by Mr. Sanchez, and if that is his handwriting? A. Yes, it appears to be.

Q. Have you any doubt about it? A. No.

Q. I show you one marked Exhibit I for identification, and ask you if the signature is that of Mr. Sanchez? A. Yes; that is his signature. 153

Q. Do you know what was the course or custom of the business, when a man took charge of a department, with regard to advancing money to agents? A. I do.

Q. Do you know as matter of fact, or is it not true, that this man in charge of the department advanced or lent money to agents who were to solicit insurance for the company? A. Yes. It is the general custom to advance money to agents, and the managers are allowed a certain amount per month for their personal use. It is the general custom to advance money to agents.

154 Q. Is it not also the general business of this company to provide that what is salary shall be, in an account between him and the company, dependent upon the net profits of the business of the department? For instance, if the net profits of the business to him, under his contract or arrangement, is less than the salary agreed upon, is not that deficit charged to him personally? Do you understand me? A. Yes; but you mention "salaries agreed upon." The custom with the agent or manager is to have a certain amount of commissions; and there is an account of those commissions gained and to be gained; and they draw every month a certain amount, and that amount is charged against the agent, and it is
155 expected that he will gain that amount, or more, in commissions.

Q. If he does not gain that amount in commissions; for instance, if they allow him $500 per month, or $6,000 per year, and his interest in commissions at the end of the year is $5,000, then is the $1,000 that the company has advanced charged to his personal account? A. It is.

Q. Is not that the general way they do the business? A. It is.

Q. Then if he advances money to the agent, and that money, or any part of it is lost, what is done with that? A. That depends upon the contract. It varies. Sometimes the agent has a contract where
156 that amount which he is allowed to advance to agents is limited; and in that case it is said that he may advance from funds belonging to the Spanish-American Department of the New York Life Insurance Company to agents that amount, but not above that; and that he is personally responsible for that amount, for those advances to agents.

Q. If he advances over that amount it is charged to him personally, is it? For instance, if he was allowed to advance to agents $4,000, and as matter of fact he advanced $5,000, what is done with the extra $1,000? A. It would remain charged to the agent who got it; and finally, when the account would be

liquidated, if he had advanced more than was al- 157
lowed, he would be called upon to make it good; it would be charged to his account.

Q. Suppose the company advanced to him $500 per month, or $6,000 per year, and they allowed him to advance $4,000 to agents, and that when he got through with the year his commissions amounted to $7,000. He has advanced $1,000 more than he had a right to, to the agents, $6,000 he had as salary and $7,000 has come from the commissions. He would then be even with the company, would he not? A. Yes, but the agents' advances are not made from funds which he draws for his own personal use, they are for personal expenses.

Q. But if they paid him the $6,000 for himself, and 158
he had used $1,000 in excess of the company's money—— A. For himself.

Q. For the agents; $1,000 in excess of what he had a right to; but the commissions made up the $7,000. Would he then be charged with anything additional? A. No; he would not.

Q. Mr. Halberstadt, the plaintiff in this case, had to report every month, did he? A. He did. I did not find any month that he did not report. There is no charge, so far as I know, that he did not report every month.

Q. Is there any charge, so far as you know, that when you did report he did not report the facts? If he had expended money this way or that way, did 159
he not so report, so far as you know? A. There have been some expenses made by him which I know nothing about, which have not been reported to us.

Q. Have you any information or knowledge of the expenses incurred or paid that were not reported? A. No, because I do not know what you call "reported." It may be the balance sheet may be received every month, and the balance sheet may be right, but still expenditures might have been made in such a way that they cannot be noticed in the

160 balance sheet, and it is only afterwards that we find out that a certain expenditure has been made.

Q. I am asking you if you know of any expenditures which he made upon any account that he did not report. Do you know of any? You may know when you get back, but do not know now? A. I do know some that have been reported by our inspector, but of those we know nothing about.

Q. Do you know of any expenditure which he did not report? A. Yes.

Q. What? A. For instance, if there was an amount advanced to an agent who was discharged, and which was not charged up to his account, but to some different account, it was so reported.

161 Q. I am asking you what you know? A. I know that from his reports. I was not there and did not investigate it myself.

Q. Do you know of any expenditure by Halberstadt on any account whatever that he did not report? A. I never was in Mexico and cannot be sure of that.

Q. Do you know of any report by Halberstadt of any——? A. Report by him? No.

By the Court:

Q. I think you do not discriminate between "report"—that is, mercantile reports—and stories which came to you or information which comes to you.

162 Mr. Halberstadt sends you a monthly statement, does he not? A. Yes.

Q. We will suppose it is on a piece of paper. Now, do you know of any expenses which he made, or any receipts which he made in a certain month, which was not contained somewhere upon that monthly report? A. No; I do not.

By Mr. Ingersoll:

Q. Do you know of a solitary one that was sent to you that was not honest? Do you know of a solitary report sent by Halberstadt in which there was one item which was not true. I am not talking

about which some other man says, but do you know it? A. I do not. 163

Q. I asked you with regard to the method or custom of business when Mr. Halberstadt had charge down there. When a man got his life insured for a certain amount, then was the amount of the policy payable then; or after the company here had passed upon the risk? A. The amount was payable after the company passed the risk, or accepted the risk, so that if Mr. A asked for an insurance upon his life for $5,000, he made his application, stating his age, and the facts that the company wished to know about his ancestors and his health; and then that application was forwarded to New York. The amount of the policy and the premium that he was 164
to pay were stated, and then the company in New York either said, "This is all right," or refused it. If the company here said, "This is all right," then an insurance policy was sent from here, and after that insurance policy reached Mr. Halberstadt, or his department, it was then handed over to the person insured, who paid the premium, which was reported as paid to New York on account.

Q. Was it deposited in any bank? A. Yes.

Q. In other words, did it go into the money of the agent, so that he used it as he wanted to; or must he report that amount, and put that amount in a bank? A. Not the exact amount. The office there would report the premium, and deduct there- 165
from their commissions.

Q. They would then deduct the commission and then put the balance in bank to credit of the New York Life Insurance Company? A. They would remit, or put the balance to the account of the New York Life Insurance Company.

Q. Does not the agent keep a bank account of his own? A. He does.

Q. Does he not put that money--all the money that he gets—$100 one day and $150 the next day, in bank? Does he not make a deposit of that to his own credit, in his own bank account and then at

166 the end of the month, or at the end of two weeks, send to New York what belongs to the company? A. No. The instructions are that he has to balance his accounts with the remittances, and the balance had either to be remitted in a draft to the office here, or a deposit has to be made for the credit of the New York Life Insurance Company.

By Mr. Ingersoll:

Q. If that agent requires money to run his office, or anything like that, then does he not get it from the New York Life Insurance Company? Does he not call upon them for it? A. No. He gets it by
167 calling for it upon the Spanish-American Department. In other words, he does not take it out of the premiums paid to himself. If he wants any money to advance to agents, or for any other purpose, he applies to his superior in the Spanish-American Department, and that department gets this money partly from the New York Life Insurance Company and partly from its own funds.

Q. He is not allowed to take from these premiums the expenses? He takes his commissions. If he needs any more, he has to call on the department, does he not? A. With the exception of the amounts which the contract and agreement allowed to remain—say as to any amounts that he had a right
168 to retain, to which he is entitled as per contract, for his office expenses, and for his personal use. Up to that amount he is entitled to take the amount specified in his contract. If he wants over and above that amount he has to apply for it.

Q. How long did you keep the books for Mr. Halberstadt or for his department? A. When Mr. Halberstadt was a sub-manager of the Chili Department, I was the accountant and chief of the office work there for about five months. Previously I have had to inspect the books, and to inspect the accounts.

Q. About what time did you inspect them? I

mean between what times? A. In the beginning of 169
1888 and in 1889, but not in 1890.

Q. In 1890, were you still in the Spanish-American Department? A. I was. I went to the office at Barcelona in July, 1891, where it was a part of my business to inspect the various accounts and reports rendered there by the agents in the department and to inspect the accounts and reports made by Halberstadt, which I did. I was familiar with the course of business, with the amount of money drawn and with the amount of money paid, and with the amount used or claimed to have been used for expenses, and with the amounts claimed to have been advanced to agents. I do not know of any agreement that Mr. Halberstadt should have an al- 170
lowance on account of his loss by removal from Chili to Mexico. I do not know as a matter of fact that they agreed to allow him $3,000 additional. I remember having heard something about it from Mr. Halberstadt himself, but not from anybody else.

Q. Did you render this account on which the balance was based in the contract? Did you make it out? Did you make it out in Chili? A. I did not; but I was in Chili then.

Q. Didn't you make out Fesser's books? A. I did.

Q. Was it not from making out that account that there was found due $2,396.22? A. I do not remember the figures. 171

Q. But did you make it out, whatever it was? A. Yes.

REDIRECT-EXAMINATION by Mr. Einstein:

Q. Do you know where the books of the Spanish-American Department now are? A. Yes; they are in Barcelona.

Q. Are any of them in the City of New York? A. Not of the Spanish-American Department.

Q. The Spanish-American Department had its headquarters at the City of New York, did it not? A. Yes, until 1891.

172 Q. You have seen all these books in Barcelona? A. Yes.

Q. You were asked by Col. Ingersoll whether there was anything on the face of Halberstadt's accounts that would arrest your suspicion as to his honesty, was there? A. There was.

Q. What was it? A. The suspicion was that there were advances—for instance, that there were advances made to people from our funds who had no connection with our business.

Q. And then those advances were charged in these accounts as though they had been made in the legitimate conduct of the business? Is that it? A. They were charged on our books to these people; when
173 he had no right, or nobody had a right to advance money to any people who had no connection with the business.

Q. In what other respects were these accounts suspicious? Was there anything about them which tended to arouse your suspicion? A. Some remittances which were made from Mexico, and which were protested, and were bought in Mexico, contrary to our instructions and to the custom—not from banks, and not from people, and not from houses from which we had to receive reports; but they were from people who were not known to us and were not considered good.

Q. What was the amount of those remittances in
174 this case? A. The remittances we objected to amounted to something like $10,000 American gold; and $5,000 of them had been protested; and the other $5,000 has been finally paid.

Q. Do you mean by that that the company lost that $5,000? A. No. If it will not be paid, then Mr. Sanchez will lose it.

Q. How long has it been since those drafts were protested? A. I believe in July last. I cannot tell exactly, but about that.

Q. What is the name of the house from which he drew or from which he bought exchange? A. Somewhere from a company called The Pan-Amer-

ican Exchange, which has a house in Mexico and 175
one in Chicago. I believe those are the ones which were produced.

Q. These advances which you say were made to persons who had no connection with the company—were these the advances that I have referred to on my direct-examination as amounting to something like $2,000 or over? A. I cannot tell. You referred to them as $2,000; yes.

Q. Do you recollect about the amount? A. In the reports it was mentioned as $2,000.

Q. Now, in relation to this circular letter which is dated December 29, 1891, and which was read by Col. Ingersoll to the jury, and which is signed "Spanish-American Department of New York Life 176
Insurance Company per J. Sanchez, General Manager—A. Darlot, J. Wallerstein." Won't you be kind enough to explain the circumstances surrounding the writing of that letter? A. It was the custom of the whole office of the Spanish-American Department to write and to send those letters at the end of each year to its different agents and managers. They were about forty, fifty or sixty letters copied, exactly reading the same, and forwarded to these agents and managers.

Q. And this was written not by you, that is, not at your instance, but at the request of Mr. Sanchez, and written for him? A. It was written for him. It 177
has always been the custom since in that department to write these letters of congratulation. I cannot tell if it has been done this year, but I suppose so, and I do not know of the custom having been discontinued.

Q. When did Mr. Halberstadt cease to be connected with this company? A. On September 1, or August 31, last.

RECROSS-EXAMINATION by Mr. Ingersoll:

Q. As I understand it, you had a suspicion on account of plaintiff having advanced money to one not

178 connected with the department? A. Yes. It is the fact that with all reports, with every report which went off, any money advanced to agents was shown on the report, and he sent to the department a copy of the contract with such agent. It was then easy to find out whether he had advanced money who was not an agent by looking and seeing whether he had a contract with that person.

Q. Did you look and find that he had no contracts with the person to whom he advanced money? A. I do not believe I have ever heard the name.

Q. Just answer, honor bright, did you find that he has advanced money to persons as agents and then find that he had no contract with those persons as
179 agents. Just tell the jury that? A. Yes.

Q. Did you find such a case? A. Yes.

Q. What case? A. I remember one time, I can't remember without the books and papers all the names; but there was the name of Walter F. Burns. I remember that name, and that I had never heard it. I do not recollect the amount advanced to him. It may have been $300.

Q. When was that? A. I believe that it was in August or September, 1890.

Q. Was it before that circular letter or after? A. It must have been before.

Q. Is that the only one you remember? A. That is the only one I remember the name of.

180 Q. That is the only one you can tell, is it not? A. Yes.

Q. Did you look among all the contracts to see if there was such a contract? A. I did, and I could not find it. This must have been before the circular letter. That is the only one I remember the name of.

Q. If that should turn out to be a mistake then you have nothing to say on that subject any more, have you—on any advances to persons not agents? A. Yes, because I do not remember the names, but I remember that there were several that we knew nothing about.

Q. Was it not the rule and the orders that when-

ever he advanced money to anybody as agent he 181
was compelled to send a copy of the contract which he had made with that agent? A. Yes.

Q. If he did advance money to a man who was not an agent, and sent you no contract to show that he was an agent, then, of course, you would not have allowed the account? A. No.

Q. Was any objection ever made that he had advanced money to a person, pretending that he was an agent when he was not? A. No, he did not pretend they were agents.

Q. You say you had your suspicions because there were some drafts that were protested? A. Yes.

Q. Did you understand by that that he did not pay for the drafts which he had reported to have 182
paid? Do you now pretend to say to the jury that there is anything to show that he did not pay for the drafts the amounts that he had reported? A. No. (Min., p. 73).

Q. I ask you this: I understood you to say that there were some $10,000 sent, that is, that he bought exchange from this Pan-American Exchange for some $10,000? A. Yes; it was bought from two different houses. $5,000 was finally paid and $5,000 was not paid. It was on some Chicago house.

Q. Now, what I ask you is, do you believe—have you anything to show or to make you think that there was any fraud on his part in getting that ex- 183
change? A. Yes.

Q. What was it? A. A report which was sent to me from Mexico to the effect that one of the parties whose remittances were bought from was an intimate friend of Mr. Halberstadt, and, in fact, in business relations with Halberstadt, and that was the reason he bought it.

Q. Did you think at the time that he understood it was not to be paid? A. Yes; I thought he must have known it.

Q. Which he thought would not be paid? You think that he got any part of the money himself;

184 was that your idea? A. The fact is that I did not form an opinion.

Q. If the draft had been paid would you have still thought it was dishonest? A. Yes.

Q. When were the Spanish-American books last here? A. In the first part of the business.

Q. You took them over to Barcelona afterwards? A. Yes, sir.

Q. Did you bring them back? A. Yes, sir; some of them.

Q. All of them? A. No.

Q. Were you over there at the time they were in Barcelona? A. Yes; I was in Barcelona at this time.

185 Q. Did you have care of these books all this time? A Yes, but in company with some one else.

Q. Is it not the fact that Halberstadt made reports to the New York Life here of his business in Mexico and Chili, and don't you know that he sent on the accounts directly to the New York Life Insurance Company here? A. He did.

Q. Don't you know that he sent every month reports to the Spanish-American Department also—press copies? A. He did; a report of every item, of every dollar that he spent or collected.

Q. Is it not true that after you looked them over in your office you sent to him any objections which you had to any of the items? A. Those which would

186 be found, yes.

Q. And the next time he had to adjust that, did he not, if there was any misunderstanding or anything wrong? A. Yes.

Q. And he did explain, up to the time that circular letter was written, didn't he, to the satisfaction of Sanchez? A. No.

Q. Do you say that it was the custom to issue that circular letter congratulating the agents on the amounts which they had stolen? A. No.

Q. Do you say that they issued such circular letters to men who had made false reports; that that

was the custom? A. No; there may be mistakes or 187
an oversight on the part of any one.

Q. That is, if that letter was issued it was a mistake? A. That does not follow.

Q. When you signed it it was a mistake? A. I signed a great many of those letters.

Q. And you knew at that time that the reports were long and you did not tell Sanchez? A. Mr. Sanchez knew all about it.

Q. Had you told him before? A. He did not need any telling.

Q. Tell the jury whether it was the custom of the Spanish-American Department to send such a letter as that circular letter to persons suspected of being dishonest? A. No, it was not. 188

By Mr. Einstein:

Q. You spoke of Halberstadt making reports to the New York Life; when did he do that; during what period did he make those reports? A. Mr. Halberstadt reported to the New York Life direct only the premiums collected, and that for account of Mr. Sanchez. Only to save time those reports were sent from Mexico direct to the company. This was during the period from about April or May, 1891, until September, 1892. I have seen copies of these reports in Barcelona, but not in the New York office. Mr. Halberstadt told me or wrote me that he sent these reports to the New York office. 189

Q. Were they reports only of the premiums collected or did the reports contain the statement of his disbursements? A. Some of them, yes; others were contained in reports sent to Mr. Sanchez at Barcelona.

Q. Under the agreement between Mr. Halberstadt and the Spanish-American Department he was required to send to the Spanish-American Department "duplicates of all agreements or contracts which he may enter into with agents appointed as such by himself." Now, did you have any such duplicate contracts on record of the persons to whom you say

190 he made these advances and who were not connected with the company? A. We had no contracts on record.

By Mr. Ingersoll:

Q. You do not know any name except Burns? A. No.

Q. Do you know how they made up that $2,000; where did you get it from? A. It was taken from the books which were kept under Mr. Halberstadt's direction.

CHARLES C. WHITNEY, sworn and examined as a witness for defendant:

191 By Mr. Einstein:

Q. What is your business? A. I am secretary of the New York Life Insurance Company. I have been secretary since February, 1892. That company is a mutual company. We have no books belonging to the Spanish-American Department. They have never been in the possession of the New York Life Insurance Company.

Q. As I understand it, up to April, 1891, or until within a year or so, they were in New York City, were they not—at the Spanish-American Department, at its headquarters at 346 Broadway, in the building of the New York Life Insurance Company, for the same period? A. It had headquarters there,
192 but removed before that time. The general manager was here and had the books with him. They were first removed, I think, early in 1891. Mr. Sanchez brought back with him a certain portion of the books—whether all or not, I do not know—during the investigation of the company by the Insurance Department; and after that investigation by the Insurance Department was over, he sent the books back. This was in January, 1892. The report of the Insurance Department is dated January 19, 1892.

Q. This is a mutual company. Will you give us a brief description of what you mean by that?

Objected to.

By the Court: 193

Q. That is, it is not a stock company; but the policy holders participate, or are supposed to participate in the profits. That is the idea, isn't it? A. It is.

CROSS-EXAMINED by Mr. Ingersoll:

Q. Are you the secretary of Mr. McCall, the president of the New York Life Insurance Company? A. I am not.

Q. You do not know anything about any message that he would send? A. I would ordinarily see them.

Q. Look at this and see if you saw that? A. I have no recollection of this. 194

Q. Is that your signature? (Referring to another paper.) A. It is. I wrote that letter and sent it to Mr. Halberstadt.

Said letter is marked Plaintiff's Exhibit J for identification.

Mr. Einstein states that, reserving the right to call as a witness the writer of the articles in the *Times* to state the sources of his information.

[DEFENDANT RESTS.]

195

SIGISMUNDO E. HALBERSTADT, plaintiff, recalled:

By Mr. Ingersoll:

A. I have heard the testimony of Mr. Wallerstein about some account against a man by the name of Burns, and I had advanced some money to Mr. Burns, and that this Mr. Burns sustained no relation to the company. The exact transaction with Burns was: This Mr. Burns was a friend of mine who came from New York to Mexico, and he brought some money with him, which he asked me

196 to keep for him. He deposited it with the company, and I entered it upon the company's books. The amounts were perhaps $1,000 or $1,500. There was a mistake made in this account by the cashier of $104; the company made me responsible for it, and I paid it back.

Q. State to the jury whether that is the only account ever sent to Barcelona, or to New York, in which the name of Burns appeared? A. The name of Burns has been in several accounts, because I refunded the amount in installments; and so his name did not disappear from the account until the last cent had been paid. They saw in Barcelona every month how that account was rendered, and
197 that there was paid $20 or $50.

Q. That was money that he deposited? A. Yes, and the $104 which was left. His whole account did not last more than a month. That was the only transaction, the deposits of money and the payment that Burns ever had with me. I never reported to the company at any time that he was an agent. I never charged any money as advanced to an agent, with whom I had no contract, and I never sent any account to Barcelona, or to New York, of having advanced money to a man as agent with whom I had no contract.

Q. You always sent a copy of the contract? A. Yes; whenever he was an agent we sent the con-
198 tract, and I never advanced money to anybody unless I was entitled under the contract to do so. We wrote all our books in copying ink, and we put them in the press and took press copies of every entry and sent them to Barcelona; and at the end of each month they would object to an entry of $100 or of 25 cents or of $10, but they never made any objection to my account. If they had, they would have sent out an inspector at once and looked after that. They never sent any objection to me that I had advanced money to a man who was not an agent.

Q. Now, as to protesting the draft. Of whom did

you buy the exchange that has been talked about— 199
the $10,000, or whatever it was? A. It was $2,000. That was one draft; and there was another, for the company.

Q. There were $5,000 in all? A. Yes. I bought one draft of $2,000 and one draft of $1,000. I bought them from an exporter. Exchange was very high in Mexico, and I saved the company four per cent. by buying that commercial draft. It was drawn against parties in Chicago, and the drafts had always been punctually paid. It was a firm in good standing, but one of the Chicago firms to whom he consigned his goods failed and carried him along with him, and on the 9th of June, 1892, he came to me and said, "That draft you bought for the company will prob- 200
ably not be paid. You write to the company and ask them to return it, and I will give you a bank draft in return, or a draft drawn upon the house of G. Amsinck & Co., to whom I am consigning my goods." So I wrote to the parties, stating the circumstances, and said that if the draft was not paid they would please return it at once, and I would send another. The letter was acknowledged by the company on the 16th of June, and towards the middle of July that man came to me and said, "Is not that draft paid?" —because I had heard nothing from my firm. I said I supposed that it was, because the company has not returned it. But the company, instead of paying any attention to my letter, had the draft protested 201
and sent to Barcelona by mail. There they kept it probably a fortnight, and towards the end of August the protested draft came back. I then put it in a lawyer's hands and he wrote out a complaint, but when the new inspector came out he did not sue the man on that draft, but put it in suit against me. The draft of the Pan-American Exchange was bought through a broker also. Those people had $50,000 capital, and I considered them entirely solvent. That was for $3,000. I do not know whether it was paid. They have not reported up to date that it was not paid. Up to the time that I left the

202 office there was no report that it was not paid. At the time I bought that exchange I believed it to be perfectly good. I bought $5,000 for my own account at the same time. I did not have any interest, direct or indirect, in its not being paid, nor did I receive, directly or indirectly, by promise or anything else, any part of the money that was paid for the exchange. The transaction, so far as I was concerned, was absolutely honest and fair, and I acted on my best judgment.

Q. At one time, as I understand it, you were in Chili? A. Yes. I was moved by the company from Chili to Mexico.

Q. State whether you had any talk with any per-
203 son connected with the Spanish-American Department about allowing any amount to you as expenses for moving, and for losses by moving? A. Yes; I have a letter.

Witness produces letter and it is marked Plaintiff's Exhibit K for identification.

Q. Is this the letter which you referred to a moment ago, which contained something with regard to the payment of losses and expense of removal from Chili to Mexico? A. And with regard to furniture.

Mr. Ingersoll: The witness will mark the part referring to the furniture, and which I want him to
204 read.

Mr. Einstein (after examining letter): We will let him read this part.

Witness: Advance of $2,000 current money. You tell me that officers in Chili ask you a guarantee of this amount. This is because you told me the necessity you had of this advance. He indicated me in your name that you should offer special guarantee. I copied textually from the letter, what he indicated when I ordered that he would make you that advance. I see there has been a mistake because you are not satisfied on account of my having asked you for this guarantee. I have no inconvenience in

waiving the guarantee. I wrote to-day to Santiago 205
office to put that amount at your disposal without guarantee and deduct from your part of profit out of balance at end of year that amount. If in that time it will be inconvenient to you to pay it out we can prolong it for some longer time, for the whole or part of it; and you will indicate me in due time, and as you will indicate me in due time we will gauge the matter."

Q. What date was this? A. June 8, 1888. This money was used to furnish a house, or part of it, at Iquique; and I got $2,000 more from a bank, where I established a branch office of the company. My partners removed and I changed to the head office to Santiago, Chili. I saw Mr. Sanchez after that in Paris, 206
and told him that as I had lost heavily on my sale of furniture at Iquique, when I had to go to Santiago and take charge of the office there, because my partner had mismanaged the business entirely, and because while at Santiago the company called me to Mexico to take charge because the manager before me had defaulted $23,000; then I said to Sanchez, "Will you allow me to furnish a house on my arrival in Mexico?" He said, "Yes." I was down there, and an inspector of the company, Mr. Beers' son in-law, bought the furniture with me; and I charged it up on the company's books. They objected to it afterwards. They said, "You will have to put it on your personal account." So it was 207
charged up to my personal account in June, 1890, when I was here. Then the contract was reformed, and I was increased 50 per cent. in my salary.

Q. In June, 1890, you were increased 50 per cent. on your salary, and then you put the $3,000 on your personal account? A. Yes. It is charged to me.

Q. State to the jury whether you charged the amount that the furniture amounted to to the company by reason of the letter and by reason of the conversation you had with Sanchez in Paris? A. I did not charge it to the company; I charged it to the Spanish-American Department—on account of that

208 conversation; yes. I never did charge it to the New York Life Insurance Company, and I never owed it in any way to the New York Life Insurance Company, and I have never agreed to pay it to the New York Life Insurance Company, but to the Spanish-American Department, and that is all that there is about the furniture account, and since that part has been refunded the rest will be paid with the renewals which the company owe to me.

Q. How is the $2,396 agreed to be paid, in Chili? A. All those amounts have been agreed upon together to be paid out of my commissions and my renewals, and instead of drawing every month $500 in gold, which I was entitled to draw, I only drew $500
209 in silver, and the exchange, which amounts to $200 per month, went towards refunding my indebtedness to the company.

Q. How did you come to owe the company in Chili? A. Because I received only 20 per cent. commission when I started with them and had to pay my traveling expenses myself, and in opening up a country like Bolivia I had more expenses than my earnings were. Consequently I remained in debt to them. The expenses were very high. I had to travel with six mules, and had to carry two boxes of printed matter belonging to the company; and I had to have my guide and my servant with me.

Q. Did you report from time to time to the com-
210 pany what all these expenses were? A. I drew on them, and I received money by letter of credit. In every town I sent in my accounts before leaving the town, showing exactly what had been paid and what for. Those accounts were all true.

Q. How were the premiums paid? A. When a man insured I made out a receipt, and I endorsed it to the company's collecting agent. He collected the money, and then assigned me on the stub the quantity of money that he had received. I sent that stub into the office with the application to prove that the money had been deposited with the banker. Then the application was forwarded to the company, and

then if the company took the risk it was sent back 211
to the Chili office, or to the head office, and they delivered the policy. The head office sent it to the collecting agent to deliver the policy, and when he did collect the money I sent the stub to the company. The company, as matter of fact, knew constantly how much money was received and how much money I expended every month, and sometimes twice or three times a month. No part of the money was deposited in my name. I did not have control of the premium money after it was paid.

Q. And is this true with regard to all this business in Chili and in Mexico—was there the same course of business? A. So far as the two first amounts go, from Bolivia and Chili; the third 212
amount arose from the mismanagement of my partner named Viollier, while I was in Iquique. That was about four days away by steamship. Wallerstein sent for me and said I had better come down. I came down and arranged matters with him. He made the balances himself. He made a report to the Spanish-American Department of what occurred at this time and we both signed it. The report was sent after the balance for 1889 was made. Then I sent in my resignation to Sanchez, and Sanchez telegraphed me to go to Mexico, when I went and took charge. The Mexican Department was not so important as the department I had in Chili, because business had gone to wreck and ruin 213
and I was sent there to work it up. The business in Mexico when I got there was about $100,000 per year, but the first year I did a million and a half, and in the second year $800,000. The attack of the *Times* brought about a decree of business. In Mexico I advanced money to agents and reported all the advances every month, and all expenses of every kind and character. Up to June, 1890, there was no amount stipulated that I should draw from the company. I was allowed to draw against commissions. In June, 1890, it was stipulated that I should not draw more than $500 per month. Above that

214 amount checks had to be signed by the accountant and by myself, and the cashier paid the money. He had the key to the safe, and when any money belonging to the company that was paid out in checks had to be signed by the accountant and by me, so that I personally had no control of the money, I never paid out one dollar of the company's money wrongfully in Mexico. All the reports which I made to the company were true, so far I know. I was not in Chili in 1882. I was not there in 1883. In 1885 I commenced in Peru. I was employed by one of the general agents of the company on the 12th of November, 1884.

Q. How is it that you are charged here with $2,-
215 396 running from 1882 to 1886? A. I suppose that upon the account it is called so, in liquidation of certain accounts belonging to 1882 to 1886. They put them in according to the people who are interested in them, and who have profit out of it.

Q. Whenever you got a man to be insured in this life insurance company, we will say for $10,000, what was about the average premium? A. About $300 per year. Under my first contract I got 20 per cent. of that for my pay. Under the second—there were three of us—and the office got 41¼ per cent.; and then I had six years' renewals at 5 per cent. Under the original contract, when I paid in $300, $60 was credited to me when the original policy arrived
216 from New York.

Q. Did you handle that percentage yourself? A. No, that went to the general agent. He credited me on account. Under my contract in Chili, I am entitled to six years at the rate of 5 per cent., distributed according to my contract with my partners. I am entitled to 5 per cent. in Chili each year on $300 for six years ending in 1895. If they do not pay, there is no commission. When that amount was settled, it was agreed that my commission should go, as stated in the contract, and it was settled in that way. The same is true with regard to all

these accounts. The Mexican renewals terminate in 1898. 217

Q. Do you know whether any money has been paid in Chili by reason of renewal commissions? A. I know the company has credited me with over $2,000 in the Spanish-American Department on Chili business.

Q. Do you know what it is on the Mexican business? A. I do not know because they have rendered me no accounts. The Peruvian business is included.

Q. In the Mexican business, about how much were your entire commissions on renewals per annum, supposing they were all to be paid? A. I calculate that if they are all paid there will be $23,- 218
000 Mexican silver, or $15,000 in gold. The Chili renewals will amount to $2,000 or $3,000 more up to 1895. If the Chili renewals do not pay, then the Mexican renewals will be taken for that amount. In other words, I settled with the company for these advances that the Spanish-American Department had made to me by agreeing that my renewals should pay them from time to time. There is a clause which says that neither the company nor the Spanish-American Department can ever claim from me if my earnings are not sufficient to pay back. I made an agreement that my renewals might go, if necessary, for the payment of these debts; but if the renewals were not sufficient, then that was 219
the end of it.

Mr. Ingersoll: I will read the last clause on the first page of this contract:

"But it is understood that the amount above mentioned which Mr. S. E. Halberstadt is authorized to use in advances to agents shall be considered by him as a personal debt to the New York Life Insurance Company or to the Spanish-American Department. It is also understood that neither the New York Life Insurance Company nor the Spanish-American Department shall demand the reimbursement of said

220 amount until S. E. Halberstadt has earned sufficient to pay it back."

The Witness: There is another clause. That refers to the $10,000 advance.

Mr. Ingersoll: I will read that:

"The amount which Halberstadt remains to owe to the Sub-Department of Chili and Bolivia, and which shall be determined as soon as the general balance of said sub department of the 30th of June last is made, shall be paid back by Halberstadt out of renewal commissions corresponding to him, and out of the interest he may have in the business of said sub-department pending liquidation. Should the proceeds
221 of the same not be sufficient to satisfy Halberstadt's indebtedness to the Sub-Department of Chili and Bolivia, the company or the Spanish-American Department shall designate what portion Halberstadt shall devote out of his part of the profits in the Sub-Department of Mexico to the extinction of his debt."

Witness: Though I was charged with a loss, the company at that time actually made money in that department and in Chili and in Mexico.

Q. If a man has paid once or twice and then fails to pay, what becomes of the money that he has paid to the company? A. It depends upon how long he has paid. If he has paid for more than three years
222 he gets a small per centage back. Sometimes he gets a paid-up policy. Suppose that he has paid for three years and no longer, then he may get back one-fourth of what he has paid, but if he has paid for two years and no longer, then he forfeits all, and in that way I may lose the commission, and the company make the money. That is the way all over in the insurance business.

Q. Here is a letter which has been marked Exhibit I for identification. Will you tell from whom you received that letter? A. I received it from Sanchez, who was the general manager of the

Spanish-American Department. That is his signature. 223

Q. The date of this is June 26, 1888. Will you read that portion of that letter? (Indicating.) A. "We congratulate you sincerely on the quantity of insurance you have obtained, and we trust that you will go on in the same way, which will personally give splendid results to you."

Q. Now read this letter, which has been marked Exhibit H for identification. A. "July 16, 1888. We congratulate you on the result of your business. In the four months it amounts to $1,200,000 alone in Pacna, Pisaqua and Antifagosta. That you continue so is our best wishes, because in that you will find due remuneration for your good work." 224

Q. Now read the letter which has been marked Exhibit G for identification, if you find anything in that? A. That is from Mr. Sanchez. "My dear sir and friend.—The year being closed and come to an end we are glad to take advantage to offer you our best wishes and hope for your prosperity in coming year, also that everything you undertake will be crowned with success. The year which has now gone to an end has been very prosperous and the management of business in your sub-department very satisfactory, and you must be very proud of the results which have been obtained by your good management and intelligence in the management of the business. We hope that in the next year the 225 same good results will be repeated, and if possible increased. We close with our best wishes and with the sentiment we reiterate the expression of our sincere appreciation, and remain your friend, J. Sanchez."

Q. About that which you owe in Mexico. Is that in silver or gold. A. Silver. In Mexico I owe about $3,000, and in Chili it was $12,000.

Q. It says here $12,360.71. A. That was in June, 1890. Since then the company has passed my accounts, and, as far as I remember, it is a little over $10,000 now in Chili, in gold. In Mexico I owe

226 about $3,000, Mexican silver, which is worth to-day about 64 cents on the dollar.

Q. And your renewal commissions, how much do you make them out in all? A. I calculate my Mexican business, if everything is paid, as $22,000, which would be about $15,000 or $16,000 in gold. In Chili it is $2,000 or $3,000 more.

Q. How much is all the debt, taking the Mexican and Chilian together? A. It is about $12,000 gold altogether to-day. Since this was agreed to in Mexico there has been a considerable amount paid to the company. According to the last accounts I have had from the Spanish-American Department they have credited me with over $2,000 in Chili and
227 in Mexico about $3,000.

Q. Was there any charge made against you for any shortage in the Mexican office, according to Mr. Wallerstein, that occurred before you went to Mexico? A. No. There was certain losses on agents who were there before I got there, and which I had to accept in my contract. If the money was advanced to them of course it was charged up against my management; any that had been advanced before I got there were charged up to the profit and loss account and not to me. Mr. Wallerstein did not bring in any that had been charged to profit and loss account as against me in his testimony.

Q. What is it that you wish to explain about
228 Cassevechi? A. Merzbacher sent down an agent called Cassevechi and gave him money here without my instructions; and then they charged him up to me on the books, and I objected.

Q. Is that part of the account? A. That is part of the agent's account which was spoken of the other day. They are trying in Mexico to get me to pay it.

Q. You are not now in the employ of the New York Life Insurance Company? A. No, sir; on the 31st of August I ceased.

Q. I will ask you whether the *New York Times* was circulated in Mexico? A. Yes. All the insur-

ance people took it to see the articles that the *Times* 229
was publishing against the New York Life.

Q. Were the papers that had articles against you also circulated in Mexico? A. Yes.

Q. Who appointed cashiers and accountants in Mexico and Chili—the company or you; the Spanish-American Department or you? A. In Chili the Spanish-American Department; in Mexico also. One was appointed by me, the last cashier, Lozier, and that appointment was confirmed by the Spanish-American Department. He signed the accounts every month there. The Spanish-American Department knew of his employment. He signed the cash report and all documents which we had for collection; and those reports or documents for collection 230
stated the amount which was due, when it was due, from what it arose and whether insurance premiums or not; and then the accountant countersigned all papers with me.

Q. This contract which was introduced in evidence —you may state whether you have, so far as you know, violated this contract? A. No; I have not.

Q. In any particular, as far as you know? A. No, sir.

Three telegrams are marked Exhibits L, M and N for plaintiff for identification.

Mr. Ingersoll reads in evidence a translation of Exhibit N. The said translation being as follows:
231

"My reputation has been damaged greatly by *New York Times*' repeated publications. Impossible to settle this matter by wire. If company pays expenses will leave here for New York and try to arrange matter."

CROSS-EXAMINATION by Mr. Einstein:

Q. Where were you in September, 1891? A. In Mexico. I was there during the whole of September, 1891. On the 10th of October, 1891, I was in Mexico. I was there also on the 1st of November, 1891.

232 Q. Those are the dates of the four articles of which you have complained in this action. When did you see these articles for the first time? A. About eight days after they were published. It took about eight days for them to reach Mexico.

Q. When did you come to New York for the first time after November 1, 1891? A. I came in November of last year—1892.

Q. That is to say you were not in New York between November, 1891, and November, 1892? A. No.

Q. Where were you in March, 1891? A. I was in New York and Mexico in the same month. I was in New York in the first part of the month. I was
233 in New York then ten days, I suppose.

Q. Do you know Dinkelspiel? A. I have seen him once.

Q. You know to whom I refer? A. I know three Dinkelspiels, but I only saw all of them but once; so it don't matter which of them. One I met in Merzbacher's office in the Spanish-American Department in New York; the other I met in New Orleans in the New York Life Office; the third one I met in Merzbacher's office. That is the one who went to London afterwards. I only saw him once and my acquaintance with him is not very close.

Q. Do you know Merzbacher? A. I knew him; I do not know him to-day. There is no difficulty be-
234 tween us but the accusation which was made against him by the New York Life and the *Times*. That cuts off my friendship with him. I thought he was a dishonest man.

Q. Did you think so from what you read in the papers, or did you have any evidence of it other than that? A. From the Insurance Department report I have drawn my conclusions.

Q. What report is that? A. That is published by the Superintendent of the Insurance Department at Albany.

Q. You mean the report of the Superintendent of

the Insurance Department on the examination of the 235
New York Life Insurance Company? A. Yes, sir.

Q. When did you for the first time consult counsel in relation to commencing this action? A. I cannot tell you the exact date, but somewhere towards the end of 1891.

It is conceded that this action was commenced December 3, 1891.

Q. How long before that had you instructed your counsel to commence this action? A. Perhaps a month.

Q. Did you do that by letter? A. Yes.

Q. When was the first time you ever saw these particular papers which I have in my hand? A. I do 236
not know. It might have been when the papers were sent from Mexico to Col. Ingersoll. I sent a copy to him as soon as I saw the publication.

Q. Did you send slips, or did you send the newspapers? A. I sent clippings, not the whole paper. I saw them in Col. Ingersoll's office in November, 1892, not before.

Q. What is your business at the present time? A. I am plaintiff in this case.

Q. Have you any other business than running a libel suit? A. I have very important concessions from the Mexican Government which I cannot attend to on account of this business.

Q. Then you have no other business than running 237
this libel suit, and attempting or trying to make use of concessions given to you by the Mexican Government? A. I have mining interests. I am vice-president of one company, The Candelaria Mining Company of Durango. I am not a officer of any other corporation. I am a stockholder in some other companies.

Q. That vice-presidency doesn't take up much of your time, does it? A. It would if I was in Mexico.

Q. Why do you not now go to Mexico? A. Because I am here for this suit.

Q. Is it not the fact that there is a criminal com-

238 plaint now pending against you in Mexico? A. Yes.

Q. By whom was that complaint made? A. There was a false complaint put in by the New York Life, and after they put that in the man who put in the complaint ran away and now the suit is up before the Superior Court of Mexico.

Q. By whom was that complaint made? A. A man called Castroverde. He representrd the New York Life by power of attorney given to the Spanish-American Department of the New York Life.

Q. What was the complaint that he made against you? A. I do not know what the complaint is, because I have never been notified. I learned that there was a criminal complaint against me in Mex-
239 ico from my counsel Mr. Alfara, in Mexico. He informed me of that towards the end of October, but I was on my way to the mine in Durango. He told me that they had put in a complaint against me. I consulted Colonel Ingersoll, and he said come right to New York-

Q. Why did you not go to Mexico, where this criminal complaint was made against you, and face the charge? A. Because I did not want to go in prison in Mexico, where there is a law that they can keep anybody seventy-two hours, and then a month afterwards they investigate whether you are innocent or guilty. I thought it was best to come on to New York, and if they have anything against
240 me they can put me in prison here, where I am in a civilized country.

Q. So that really you are not in New York so much to attend to your suit as you are here to get away from a criminal complaint made against you in Mexico? A. On both accounts.

Q. What is the nature of this criminal complaint against you? A. I do not know; because the law of Mexico is that your counsel cannot see the complaint, you must see it yourself.

Q. Don't you know that the criminal complaint against you there is for embezzling money of the New York Life Insurance Company? A. That is

what they pretend. That is why I came to New 241
York, so as to face it here.

Q. Have you not heard anything with respect to any of the details of this complaint against you? A. Only what the papers published.

Q. The *New York Times?* A. Yes; that was in October last.

Q. Do you mean to say that the *New York Times* is the only paper which published that fact? A. It is the only one that I have seen.

Q. You did not look for it? A. I have been watching the *Times* ever since this suit. I am a subscriber to the *Times*.

Q. When did you first go into the insurance busi- 242
ness? A. On the 12th of November, 1884. I was not an insurance agent before that. I was a sugar planter. In November, 1884, I went into business as agent of a certain Mr. Fesser, who was the general agent of the New York Life Insurance Company in Peru. I was with him until the first of December, 1887. He was the agent of a man called Dickinson, an agent of the New York Life Insurance Company in all Spanish-American countries. In 1887 the Spanish-American Department made a change. Sanchez came to Chili, and called me from Bolivia. He signed a contract with Mr. Fesser, Mr. Viollier and myself, to manage the Chilian and Bolivian business for seven years.

Q. What was your business in September, 1887, to 243
June, 1889? A. I held the position of assistant manager of the Chilian and Bolivian Department of the New York Life Insurance Company from the first of December, 1887, until June, 1889. From October, 1889, until my connection ceased I was manager of the Mexican Department. That I held from September 1, 1889, but I did not take charge until October. From September, 1887, to June, 1889, I was assistant manager of the Department of Chili and Bolivia, and from October, 1889, until my connection ceased, I was manager of the business of the company in Mexico. As assist-

244 ant manager of the company from 1887 to 1889, my duties were—sometimes I applied for insurance. That was most of the work I did. The department had four offices. The principal office was in Santiago. I left the Santiago office for Iquique. Fesser and Viollier were in charge of the Santiago office. I was at Iquique, but not always; I traveled up and down. I solicited insurance up to the end of 1888; when I went down to Santiago, I took charge of the office. I wrote letters, signed accounts and did whatever business came under my charge.

Q. What was your duties as manager from 1889 until your connection ceased? A. To look after the company's business all through the Republic of
245 Mexico. Doing new business and attending to old business. I very seldom solicited. I did not collect premiums. The collecting agent and cashier of the office did that. When the collecting agents collected premiums they turned them over to the office in Mexico. I was the manager of the Mexican office. They sent in a draft by mail to the order of the New York Life Insurance Company, sub-department of Mexico; and this draft we endorsed to the bank.

Q. To what *person* were the premiums which were collected by the collecting agents turned over? Not to the room, or to the building? It must have been to an individual. A. If a man sends in a draft, and you open the letter, that draft and that letter
246 goes out to the accountant. It is entered on the books. Then it is endorsed over to the bank, and placed to the credit of the office in the bank.

Q. What was the name of the bank account? A. New York Life Insurance Company, sub-department of Mexico.

Q. Who signed the checks? A. The accountant and I. The accountant was a man called Gamuchicka employed by the Spanish-American Department of the New York Life Insurance Company. I paid his salary, but he was appointed by the Spanish-American Department, at my suggestion. He was an old clerk. I found him there. He had been

eight years with the company formerly; and I sug- 247
gested that he should be promoted, and they promoted him. He was cashier before. By the contract it was necessary that both he and I should sign checks. Everything was signed by both; not only checks, but letters and everything. Moneys were withdrawn upon checks signed by me and by the accountant.

Q. You say you bought $5,000 worth of exchange from some house—that you bought it for the company? A. Yes. It was not paid. He has paid part of it since to me. I cannot tell you how much because I have not been to Mexico since. This is my individual money; but I have no control of it now, that I am away. My wife and my lawyer are 248
managing my business now. He may have paid $2,000 or $3,000. He had paid when I heard last about $1,000 at the time and offered to pay it all. The name of my partner in Chili who I say mismanaged the business was Viollier.

Q. What was the mismanagement which produced that deficit? A. He expended the money in carriages and horses, and in making too big advances to agents over and above their earnings and in keeping up high style lunches, and all that sort of thing; general mismanagement. I was not at home when that was going on. I had no knowledge of it when I got there.

Q. You stated in the agreement of June 20th, be- 249
tween yourself and Mr. Sanchez, that you then owed the Spanish-American Department $2,396.22 in American gold; what is that for? A. What date was it?

Q. From 1882 to 1886. A. That was money I had received for traveling expenses in excess of my commissions earned.

Q. Between 1882 and 1886 I understood that you were soliciting? A. Yes. The account is called 1882–1886, but I was not employed until November 12, 1884.

250 Q. Then this indebtedness arose between 1884 and 1886? A. Yes.

Q. During that time didn't you collect any of the premiums for the New York Life Insurance Company? A. No.

Q. None at all? A. No.

Q. How were premiums collected then? A. The receipts were turned in to the collecting agents. They collected the money and then signed a stub which I attached to the application, and then afterwards Mr. Fesser called on the collecting agent to remit the money.

Q. Where did you get the money which you spent in excess of the amount which was allowed you?
251 A. From bankers by letters of credit, or by standing order that Mr. Fesser gave to the bankers that when I needed money they should pay to me. Then I gave a receipt for the money and they charged it to Mr. Fesser.

Q. Between 1886 and 1887 you became indebted to the company $4,172.20, according to your own admission. How was that done? A. In the same way exactly.

Q. In the Department of Mexico you became indebted $5,209.25 Mexican silver. What was that for? A. For money drawn for my expenses and for traveling expenses from Chili to Mexico of my wife, as the company did not pay it.

252 Q. Where did you get the funds from which you took this $5,209.25? A. I did not get it. I asked the cashier, Mr. Lozier, for the money when I wanted it. I never had any other connection with the Mexican Department than being its manager.

Q. You read the telegram, which has been read in evidence, which was sent by Col. McCall to you? Do you know what the suits are which are mentioned in that telegram? A. I do not know. I suppose they are the suits of the company against the *Times*.

Q. There were two libel suits, were they not, brought by the New York Life Insurance Company against the *New York Times*, in one of which suits

they asked a million dollars and in the other $750,000? 253
Those are the two suits spoken of in that telegram as having been discontinued? A. Yes, and of their employees. I believe that all the employees brought suit.

REDIRECT-EXAMINATION by Mr. Ingersoll:

Q. It is charged in one of these papers that you had a conversation at the Hoffman House with somebody. Is it true that you had a conversation with anybody at the Hoffman House at any time, or at any place, in which you boasted of the manner in which you were helping yourself to the company's funds, meaning the funds of the New York Life Insurance Company? A. No. I never had any such 254
conversation with Merzbacher or Dinkelspiel or with anybody. Nothing of the kind was ever said anywhere, at any time, or at any place.

Q. During all the time that you were working for the company up to the time of the publication of these things, was there ever any charge brought by the company against you or the Spanish-American Department in any letter or in anything else, charging you with any dishonesty in their matters? A. Never.

Q. Any charge that you had ever embezzled a dollar? A. Never.

Q. They asked you something about a suit in Mexico. When you came here you said you came 255
here to face these gentlemen? A. Yes. I went to call on Mr. McCall.

Objected to.

I tried to see him. He sent out a clerk to say that he would receive me in ten minutes. After ten minutes he said that he could not receive me, but to go and see his lawyers. I came here under your advice to see what they had against me, and to meet any charges against me. I thought I had rather meet it in this country than anywhere else. I have said that I had some concessions in Mexico. I have one for immigration.

256 WILLIAM C. VAN ANTWERP, sworn and examined as a witness for defendant:

By Mr. Einstein:

I am in the life insurance business. In 1891 I was connected with the *New York Times* as reporter on the city staff. I had been reporter on the *New York Times* prior to 1891 for three or four years. I am the agent who wrote the articles upon which this action is founded.

Q. Which ones did you write? Did you write the articles in the paper of September 5th? A. This is the only one of those in which there is any question in my mind. I am not positively certain about having written this one, but I think I did write the
257 others; but I cannot tell without seeing a copy.

Q. This is part of an article to which I want to call your attention and perhaps you will be able to say whether you wrote it: "This is the situation in the Beers' Mutual Admiration Society at Broadway and Leonard street. Everything is done to avoid publicity and screen the truth." That is part of the matter I want to call your attention to. Do you recall writing that? A. I think I can safely say that I did write that.

Q. Do you recall that language? Does that sound like you? A. That sounds like me; yes.

Q. The part of this article that the other side find fault with is this: "Not one of these men, these al-
258 leged guardians of trust funds"—referring to Beers and his directors—"knows that Halberstadt, Beers' Mexican agent, is short in his accounts $28,000." Where did you get the information from, that he was short $28,000 in his accounts?

Mr. Ingersoll: I object to his stating where he got the information. In this case there is no privilege stated. There is nothing to show that they acted in good faith. Instead of that they come into Court and justify; they say that it is true; that he was an embezzler; that he was a thief. If there is any privilege they must plead the privilege. If they got

this information honestly, and supposing it was 259
true, they must plead that in mitigation, not justification. They cannot plead the two things—that they did say it and that it is true, and then go on and say that they got certain information, not like that which they published; that is, not that exact information, but something in that neighborhood. I object to their trying to show from whom or from what source they got the information upon this subject unless they got it from the plaintiff himself. They have pleaded that what they said was true. What difference does it make where they got the information if it is true? That is my objection.

The Court: I think this can be introduced in miti- 260
gation of punitory damages.

Exception by defendant.

A. The information came from several sources. This particular paragraph to which you now refer me I am unable at this moment to say where I got that, but I can say in a general way where that information came from. Some I got from Colonel A. G. Dickinson, the former manager of the Spanish-American Department; some from a man named Colon, formerly employed by that company; some came from a man named Dr. Wilford Nelson, formerly employed by that company, and some of it came from various sources. This matter extended 261
over a period of eight months, and I am unable to say at this time just where it all came from. I do not recollect that any of this particular information came from any officers of the New York Life Insurance Company. Mr. Banta gave me information. He is cashier of the company, and was cashier at the time he gave that information. He was removed at about that time, and I had that information from him before he was removed. I do not remember the date. I think he was not removed as early as September, 1890. It was later than that.

Q. This particular matter—the statement that he

262 was short in his accounts $28,000—that you think you got from Colonel Dickinson? A. I think so. All the information I obtained came from some one of these sources that I have mentioned. I believed the information which was given to me to be true, and wrote those articles believing it to be true. All the matters that are contained in these four paragraphs, or four articles upon which they base their action, I got the information either from some officer of the New York Life Insurance Company, or from Mr. Banta or from Colonel Dickinson, or from Mr. Colon or from Dr. Nelson.

CROSS-EXAMINATION by Mr. Ingersoll:

263 The same Dickinson who was formerly employed by the company. I don't know whether he was discharged or not. I do not know whether Nelson was discharged. His connection with the company terminated. Dickinson quit. I saw Colon here in New York. He had been connected with the company. He was not at the time he talked with me. At that time I was a reporter for the *New York Times*. I am in the insurance business. I am with the New York Life, the same company I wrote the articles about.

Q. How long after you had written the articles saying that the New York Life Insurance Company was a universal thief were you employed by the
264 company? A. I think about two months, or in that neighborhood.

Q. About how long did the *Times* continue this attack upon what is known as the New York Life Insurance Company? A. I think it extended over a period of eight months. There was an article every day. I wrote many of them—an average of five articles per week. Only one appeared per day. I think I wrote an average of six per week. I only missed one or two days in eight months. None of these articles was complimentary to the New York Life Insurance Company. I attacked it in every

way I could, and about two months after I quit I was employed by the New York Life Insurance Company. I am connected with the secretary's office. 265

Q. Who told you that Halberstadt had said at the Hoffman House that he was helping himself to the company's funds as he liked? A. I cannot say certainly who told me.

Q. Who told you that he was a very intemperate man? A. I cannot say certainly as to that. One of the sources of information I have mentioned.

Q. Who told you that he was a German? A. The same reply. I cannot tell exactly.

Q. There was quite a lot of people giving information, and you cannot single them out and say that A said this and B said that? A. No, sir; I cannot tell exactly. 266

Q. Who told you that Halberstadt ought to be prosecuted for criminal embezzlement and theft? A. Col. Dickinson told me that several times.

Q. And that he ought to be prosecuted for larceny? Did that come from Dickinson? A. In a general way that was his statement, yes.

Q. Who told you that he had a notoriously bad character? A. That came from the same source of information. I cannot pick out the exact person. The same persons in a general way told me that he had availed himself of his opportunities to swindle the policy holders in South America. I do not know where all these people now are who furnished me with this information. 267

REDIRECT-EXAMINATION by Mr. Einstein:

Q. Who was the president of the New York Life Insurance Company when these attacks were made? A. William H. Beers.

Q. You say that Mr. Beers was the president of the Insurance Company? A. Yes. Mr. Beers is not the president of the company now. He ceased to be president in January, 1892. Mr. John A. McCall is president now. He came into office immediately

268 following the resignation of Mr. Beers, or about the same time. The Board of Directors is not now identically the same. There may have been some changes. There is a new management—entirely so—and this new management has taken place since the publication of these articles. I was employed as secretary by Mr. McCall.

By Mr. Ingersoll:

The same first and second vice-presidents are there now that were there when I was attacking the company. They had no office of secretary then. Mr. Whitney was there before, and he has been made secretary. All the directors are not the same.
269 I am not sure that a majority of the board have been changed.

Q. Do you remember that some of the Board of Directors have been changed? A. Of the board of trustees; yes. I think there has been a majority changed; if not, within one or two of it. I am in Mr. Whitney's office? Sanchez is still in charge of the Spanish-American Department. Sanchez is one of the men I attacked; he is still there. I did not attack Mr. Whitney. I did attack the first and second vice-presidents. They are there yet. I do not know whether Mr. Beers is in the employ of the company now.

Q. Don't you know what he purports to be—that
270 they purport to give him so much per year for his advice? How is that? A. I understand that he draws some money from the company. He was to have $37,000 per year.

Q. And now they have cut it down to $20,000? A. I do not know. He is not in the company as an employee. He draws what is called a pension, not a salary.

By Mr. Einstein:

Q. Under what arrangement does he draw that pension? Is there an agreement that he should have a pension? A. There is an agreement that he shall

receive an annual stipend. The old Board of Directors or Trustees made that agreement with him—the Board which existed during his regime. They fastened him upon this company before the new board came in—before Mr. McCall became president. President McCall repudiated the agreement made by the old board. There is a fight over that now in the Courts, By that arrangement he was to get $37,500 per year as an adviser, and Mr. McCall refused to pay it, and it was submitted to the Courts, and they decided it was illegal. 271

By Mr. Ingersoll:

Q. What did the present board do; how much are they giving him now? A. I do not know. They are to-day giving him something. 272

Q. And by the new board. The old board did not give him this new amount, did they? The old board gave him $37,000, didn't they? A. Yes; and then the courts beat that. I do not know that the new board is giving him something. I do not know whether it is done by the action of the new board or not.

[PARTIES REST.]

SHIPMAN, *J.*—This is an action of libel against the defendant as president of the *New York Times.* A libel is a false, malicious and unprivileged publication imputing criminal conduct to the plaintiff, or charging him with conduct which exposes him to odium, ridicule or contempt. The articles in the *New York Times* are charged in the complaint to be each and every one libelous. The explanation (or, as it is called in legal phrase, the innuendo) which is given in the complaint of the meaning of the article, represents that the articles were libelous. In my opinion, gentlemen, each article was in fact libelous. If the articles were untrue, the law im- 273

274 plies malice—that is to say, sufficient malice to sustain the action and to call upon the jury to give damages to compensate the injured party for the injury which he has actually sustained; and he is not called upon to prove actual damage.

In this case the defendant justifies by pleading that the articles were true, in the sense that the plaintiff wrongfully kept and retained to his own use specific amounts of money, and wrongfully failed and omitted to account therefor. The defendant shows that in accordance with the accounts between the company and the plaintiff, the plaintiff appeared to owe the company about $6,500 upon business done between 1884 and 1886; and that between 1886
275 and 1887 he became also indebted in another sum; and that in the Department of Mexico he became indebted some $13,000 upon the Mexican business; and that among the items in the Mexican accounts there were charges against the company for $3,000 upon a furniture account. The explanation of this indebtedness, or, as it is called, apparent indebtedness, is that these several amounts which were received by the plaintiff in excess of his commissions, were for traveling expenses, and excessive expenses in the business of the company in entering upon new fields of labor; and that the company is reasonably safe for the repayment of such excess by deducting those amounts from the various commis-
276 sions as they have matured, or will mature; and that accounts (that is, monthly reports) were made out showing in each the state of the account, that these expenditures for traveling expenses, advances, &c., were actually made, and that the plaintiff charged himself with them in such monthly reports. And, furthermore, that by virtue of the contracts between the plaintiff and the New York Life Insurance Company, or the Spanish-American Department of that company, it was contemplated that amounts for traveling expenses might be received by the plaintiff in excess, at the time, of the commissions which were due to him either for new or

for old business. Those questions of fact have 277
already been sufficiently explained to you, and I shall not dwell longer upon them except to state what the charge is on the one side, and what the explanation, defense, denial, or refutation of the charge is, on the other.

Now, if you find that the explanation made by the plaintiff is true, and that he was not, as between himself and the company, short in his accounts, implying embezzlement by failure to account and remit, then damages, the actual damages, are to be given to remunerate the plaintiff for the actual injury to his feelings and reputation which he has improperly suffered; and the extensive circulation of the libelous articles in the newspaper is to be con- 278
sidered in estimating the extent of the injury.

In addition to actual damages, what are called punitory damages are sometimes given, which are to punish the defendant for express malice as exhibited by the vindictiveness of the defendant, or by his wanton recklessness in publishing as facts assertions which it had not reason to believe were true, or the truth of which it took no pains to ascertain.

But punitory damages against the proprietor of a newspaper cannot be found in consequence of the publication in his paper by a reporter, unless the proprietor had knowledge of such publication, and approved of, or subsequently ratified the same. 279
Here the successive articles against the general management of the New York Life Insurance Company were published almost daily for eight months; and as it was said by the reporter, there was an average of an article a day for that period of time. I think that in the absence of any other testimony, it is proper for you to consider that fact in determining whether the publication of these various articles was with the knowledge of and approval by the proprietor of the newspaper.

Punitory damages cannot be given except in addition to what the law calls malice, the existence

280 of express actual malice, or of wanton recklessness in publishing untrue articles without belief or attempt to investigate their truth.

You have heard the evidence of the reporter, that he got his facts from certain persons whose names he gave; and you are to give his testimony in mitigation such weight as you think it deserves.

Are there any exceptions upon the part of the plaintiff?

Mr. Ingersoll: If it be proper, I will ask the Court to instruct the jury that from the fact that in four of these papers, covering quite a period of time, substantially the same charges as the charges which are set forth in the complaint were published, that
281 under these circumstances the proprietors are responsible.

The Court: From frequent repetition of the articles, the inference of the knowledge of the proprietor may be drawn.

Mr. Einstein: The defendant excepts to the following part of the charge of the Court:

"The articles in the *New York Times* are charged in the complaint to be each and every one libelous. The explanation (or, as it is called in legal phrase, the innuendo) which is given in the complaint of the meaning of the article, represent, that the articles were libelous. In my opinion, gentlemen, each
282 article was in fact libelous."

The defendant also excepts to the following part of the charge:

"Now, if you find that the explanation made by the plaintiff is true, and that he was not, as between himself and the company, short in his accounts, implying embezzlement by failure to account and remit, then damages, the actual damages, are to be given to remunerate the plaintiff for the actual injury to his feelings and reputation which he has improperly suffered."

I ask your Honor to charge one proposition in 283
this connection. I ask you to charge that no part of the language used in the third cause of action is libelous. The language which I claim is not libelous I will read. It is this: "The notoriously bad character of the agents whom Mr. Beers employs to do the work of the New York Life Insurance Company is a theme that constantly presents new features and new attractions. Dinkelspiel, Merzbacher, Webber, Stoddard, Moore, Halberstadt, Davis and Vanuxem are names that stand at the head of the list of Mr. Beers' warm personal friends and admirers, and to each of these men he has given valuable appointments with unlimited opportunities to swindle and deceive the policyholders. The readers 284
of the *Times* are entirely familiar with the methods and the extent to which the agents named have availed themselves of those opportunities." I ask your Honor to charge the jury that that is not libelous upon the plaintiff.

The Court: I decline to charge that.

The defendant excepted to the refusal of the Court to charge as requested.

Mr. Einstein: I ask your Honor to charge that the words in the article of September 5, 1891, "Halberstadt, Beers' Mexican agent, is short in his accounts $28,000," do not necessarily impute dis- 285
honesty.

The Court: I charge with regard to that, that the entire article as set forth in that clause of the complaint is libelous.

The defendant excepted to the refusal of the Court to charge as requested and to the proposition charged.

Mr. Einstein: I ask your Honor to charge that the words of that article, "that Halberstadt, Beers' Mexican agent, is short in his accounts $28,000," do not necessarily impute dishonesty.

286 The Court: Those simple words do not necessarily and of themselves, without anything else in the case, impute dishonesty; but I have already charged that the whole article is libelous.

The defendant excepted.

Mr. Einstein: I ask your Honor to charge that the words of the article of September 30th, "who was found to be short in his accounts $12,000 in Chili," do not necessarily impute dishonesty.

The Court: I am perfectly willing to charge the same with regard to that; but I have already told you that each article set forth in each cause of
287 action is libelous, taken as a whole,

Mr. Einstein: The defendant excepts. I ask your Honor to charge the jury that the words of the article of September 30, 1891, "who was found to be short in his accounts $12,000 in Chili," are justified by the evidence.

The Court: I shall not charge that. That is the question of fact for the jury.

Mr. Einstein: The defendant excepts.

Verdict: "We find for the plaintiff the sum of $15,000."

Mr. Yonge moved for a new trial on the ground that the verdict is contrary to the evidence, against
288 the weight of the evidence, and is excessive, and on the exceptions taken.

The Court granted a stay of forty-five days in which to file a bill of exceptions.

Defendant's Exhibit No. 1. 289

Between Mr. Joaquin Sanchez, residing in New York City, and actually in Paris, General Manager of the Spanish-American Department of the New York Life Insurance Company, party of the first part, and Mr. Sigismundo Ernesto Halberstadt, party of the second part, the following agreement has been entered into:

1. The party of the first part appoints the party of the second part as Manager of the Sub-Department of Mexico of the New York Life Insurance Company, and the party of the second part agrees to abide by all the rules and dispositions of said 290
Company which may be transmitted to him directly, or through the Spanish-American Department, that is to say, through the Managers of said Department from any locality where they may be.

2. The party of the second part, as Manager of the Sub-Department of Mexico, shall take charge of the whole business of said Sub-Department, and shall have as Assistants one Cashier and one Accountant appointed as such by either one of the Managers of the Spanish-American Department, or by the Company.

The Cashier of said Sub-Department is actually Mr. Antonio Gamiochipi, and Mr. J. Marx is the 291
Accountant, but only temporarily.

3. The Manager shall sign jointly with the Cashier, or with the Accountant. Should the Manager be obliged to be away, all documents shall be signed by both the Cashier and the Accountant.

4. The party of the second part shall be responsible of the Cashier and of the Accountant, that is to say, of their manner of carrying out their respective obligations. But it is also understood that should said Cashier or said Accountant, or both,

during the absence of the Manager, commit a fraud or an abuse of confidence, Mr. S. E. Halberstadt shall not be responsible for their acts, provided said Cashier or Accountant were appointed as such by the Company or by the Spanish-American Department, in accordance with Art. 2 of this Contract; but should they, or either one of them, have been appointed by him, all the responsibility shall lay on him.

5. Upon the arrival of Mr. S. E. Halberstadt at Mexico, a general balance shall be drawn up immediately, and all balances existing against agents and doubtful accounts shall be liquidated by instalments if necessary, Mr. S. E. Halberstadt not being responsible for the same.

New accounts shall be opened in the books to such agents (debtors) who will continue working for the Sub-Department of Mexico, and 33% (thirty-three per cent.) of the commissions on all new business brought by such agents (debtors) from the day Mr. S. E. Halberstadt takes the management of said Sub-Department shall be retained, placed to the credit of their respective old accounts until complete extinction of their debts, and 67% (sixty-seven per cent.) of the commissions on all new business brought by said agents shall be placed to their credit in the new accounts opened to them in the books of the Sub-Department of Mexico.

6. Mr. S. E. Halberstadt agrees to conserve in force all contracts made with agents previous to his appointment as Manager of the Sub-Department of Mexico. Should there exist any good and solid reason for the suspension of an agent, the case shall be reported to the Spanish-American Department, the decision of which shall be without appeal.

7. Mr. S. E. Halberstadt shall be responsible for all funds advanced by him to his agents in view to increase the business of the Sub-Department under his

charge, but it is understood that if said Mr. S. E. 295
Halberstadt is not possessed of means sufficient to make such advances to his agents, he is authorized by the Spanish-American Department to dispose of the sum of $10,000 (ten thousand dollars) Mexican silver, which he is at liberty to dispose of among his agents as he thinks best in the interest of the business in general; said advances shall be a lien against all commissions or other compensation accruing to Mr. S. E. Halberstadt.

But it is understood that the amount above mentioned which Mr. S. E. Halberstadt is authorized to use in advances to his agents shall be considered by him as a personal debt to the New York Life Insurance Company or to the Spanish-American Depart- 296
ment. It is also understood that neither the New York Life Insurance Company nor the Spanish-American Department shall demand the reimbursement of said amount until Mr. S. E. Halberstadt has earned sufficiently to pay it back.

ART. 8. This contract shall enter into force on the first day of September, 1889, and shall expire on the first day of September, 1892.

ART. 9. Every year a general balance shall be drawn and the profits or the losses resulting from the business transacted during each one year shall be applied to Mr. E. S. Halberstadt's credit. 297

ART. 10. The New York Life Insurance Company or the Spanish-American Department assign to the Sub-Department of Mexico the sum of $340 (three hundred and forty dollars) American gold per month, with which to pay the salaries of employees, rent of the office, traveling expenses, in a word, all expenses which the company, as a rule, does not attend to. Should said amount not suffice to meet the expenses, Mr. S. E. Halberstadt shall have to support the difference out of his own pocket, but it is also agreed that if the expenses are below the figure

298 above mentioned, Mr. S. E. Halberstadt shall have the benefit of the difference.

ART. 11. It is also understood that if each one year the new business transacted by the Sub Department of Mexico, accepted by the company, and on which the premiums shall have been paid, reported to and received by the company, reach the amount of $3,000,000, three million dollars, Amer. gold, Mr. S. E. Halberstadt shall be entitled to an allowance of $1,200 (twelve hundred dollars) in addition to the allowance already mentioned in Section 10 of this contract.

299 ART. 12. The Spanish-American Department of the New York Life Insurance Company assigns to Mr. S. E. Halberstadt the following commissions out of which he shall have to pay to his sub-agents the commissions agreed between them, and which in no case and under no consideration shall be superior to those assigned to him. The balance resulting shall be entered into the profit and loss account in the books of the Sub-Department of Mexico.

(*a.*) Ordinary life.....Forty-five per cent.

(*b.*) " " in 15 and 20 payments..... do. do.

(*b*2.) Ord. life in 10 payments..Thirty-five per cent.

300

(*c.*) Endowments to run 20 or more years.....Forty-five per cent.

(*d.*) Endowments to run 20 or more years, to be paid in 10 limited payments...Seventeen and half per cent.

(*e.*) Endowments to run 20 or more years and ord. life in 5 payments.....Fifteen per cent.

(*f.*) Endowments to run 15 years.....Twenty-five per cent.

(*g.*) Endowments to run less than 20 years and to be paid for in 10 payments. Twenty per cent. 301

(*h.*) Endowments to run no less than 20 yrs. and to be paid for in 5 payments. Fifteen per cent.

(*i.*) Ord. life and endowments in one single payment. Five per cent.

(*j.*) On joint life policies five per cent. less than on those without this clause

(*k.*) On policies with mortuary dividends same commissions as on those without this clause. 302

13. It is understood that the commissions above mentioned shall be paid to Mr. S. E. Halberstadt provided the applicant is not over sixty years of age and on the premiums of the first year, provided also, that the risk has been accepted by the Company and that the premium has been reported to and received by the Company or by the Spanish-American Department.

14. The commissions due to Mr. S. E. Halberstadt on plans of insurance not mentioned in Article 12 shall be determined by the Actuary of the Company. 303

15. Mr. S. E. Halberstadt shall be also entitled to a commission of five per cent. on the first six renewals of all policies written by him or by his agents and accepted by the company from the time that he takes the management of the Sub-Department of Mexico to the date of his retirement, provided he gives his services entirely and exclusively to the Company or to the Spanish-American Department in the Republic of Mexico or in whatever other country where the New York Life Insurance Company or

304 the Spanish-American Department may think convenient to send him.

16. It is also understood that on endowments to run 15 years, the renewal commission shall only be of two and one-half per cent.; that on joint life policies the renewal commission shall only be of three and three-quarters per cent.; that on policies to be paid for in 5 limited payments the renewal commission shall only be of three per cent. and this during four years only and not six as on the other plans.

17. As it has been agreed that Mr. S. E. Halberstadt shall accept all contracts in force at the time
305 of his taking the management of the Sub-Department of Mexico, should any agent have same or superior commissions to those assigned to him, S. E. Halberstadt, in Article 12 of this contract, the company or the Spanish-American Department shall pay to Mr. S. E. Halberstadt an extra commission of five per cent. on first years' premiums, and a renewal commission of three per cent. during six consecutive years in cases where the sub-agents are entitled by contract to a renewal commission. But it is understood that out of this three per cent. Mr. S. E. Halberstadt shall have to pay the collection fee to bankers and collecting agents.

306 18. It is understood that in case profit and loss account shows at the end of each year a profit less than six thousand dollars, Mex. sil., the company or the Spanish-American Department shall make good the difference to complete said amount.

19. On all renewal receipts due on policies written by the Sub-Department of Mexico before Mr. S. E. Halberstadt taking charge of it, the latter shall be entitled to a commission for collecting same of two per cent. out of which he shall have to pay to bankers or collecting agents their respective commissions.

It is also agreed that on all renewals of policies 307
written by the Sub-Department of Mexico before Mr. S. E. Halberstadt taking charge of it, which policies shall have already run seven years, Mr. S. E. Halberstadt shall be entitled to a commission of two per cent. out of which he shall have to pay to bankers or to collection agents their respective collection fee.

20. The commissions corresponding to Mr. S. E. Halberstadt on business brought by himself personally shall be integrally entered in the commission account.

21. Railway and hotel expenses and all such in- 308
curred in traveling either by Mr. S. E. Halberstadt or any of his agents, shall be entered into the traveling expenses account, which account shall be transferred at the end of each one year to the profit and loss account and Mr. S. E. Halberstadt shall be entitled to no indemnity whatever for same.

22. The books, documents, furniture and everything now and to be in the office of the Sub-Department of Mexico is the property of the New York Life Insurance Company.

23. Should Mr. S. E. Halberstadt die while carrying out his duties as Manager of the Sub-Depart- 309
ment of Mexico, a general balance shall be immediately taken and his heirs shall be paid the part corresponding to him at that date of the profits earned by the Sub-Department after deducting what he owes to the Sub-Department at the time of his death, or to any other Sub-Department of the Spanish-American Department.

Mr. S. E. Halberstadt's heirs shall also be entitled to receive the renewal commissions assigned to him as per Article 15 as they fall due, on all business brought by him since the beginning of this contract to its extinction, and said renewal commissions shall

310 be paid to the heirs of Mr. S. E. Halberstadt after deducting the collecting fee, as the insured parties go paying their respective premiums, but subject to the following restrictions:

(*a.*) Should Mr. S. E. Halberstadt die within the first year of this contract his heirs shall be entitled to two renewals after same shall have been paid by the insured.

(*b.*) Should Mr. S. E. Halberstadt die within the second year of this contract his heirs shall be paid four renewals after same shall have been paid by the insured.

(*c.*) Should Mr. S. E. Halberstadt die within the
311 third year of this contract his heirs shall be paid six renewals after same shall have been paid by the insured.

Said renewal commissions shall, as stated in Art. 15, be the following:

Five per cent. on ord. life policies.

Five per cent. on ord. life policies in ltd. payments.

Five per cent. on endowments to run 20 or more yrs.

Five per cent. on endowments to run 10 yrs.

Two and one-half per cent. on endowments to run 15 years.

Three per cent. on pol. to be paid for in 5 ltd.
312 payments.

Three and three-quarter per cent. on joint life policies, and out of said percentages shall be taken the commission which has to be paid to bankers or collecting agents for collecting said renewals.

24. Mr. S. E. Halberstadt agrees to devote all his time, activity and intelligence to the service of the company and not to accept any other occupation without obtaining the authorization of the Spanish-American Department. He agrees, besides, not to write insurance for any other life insurance company.

25. Should it happen that for some serious reasons 313
the company desires to close its office in the Republic of Mexico, it shall continue to pay, however, to Mr. S. E. Halberstadt the renewal commissions to which he is entitled in Art. 15, as said renewals are being paid by the insured parties and after deducting the collection fee.

26. Should Mr. S. E. Halberstadt retire from the services of the company of his own will and volition at any time during the period marked in Art. 8 for the duration of this contract, or should he represent, directly or indirectly, any other insurance company, he shall lose the renewal commissions assigned to him in Art. 15. 314

27. The territory in which Mr. S. E. Halberstadt shall operate is the whole Republic of Mexico.

28. Mr. S. E. Halberstadt agrees to send periodically to the company or to the Spanish-American Department monthly balance sheets and press copies of his ledger and of his cashbook, or of any other book the Spanish-American Department may think convenient to ask him, as well as duplicates of all agreements or contracts which he may enter into with agents appointed as such by himself, the company or the Spanish-American Department reserving to themselves to approve or to disapprove part or whole of said agreements or contracts. 315

It is also agreed that Mr. S. E. Halberstadt shall not make any change in the way books are kept now in the Sub-Department of Mexico, and should it be convenient to make any alteration, he shall not do it if not previously authorized by the Spanish-American Department.

29. As it has been agreed that Mr. S. E. Halberstadt's personal traveling expenses from Santiago de Chili to Mexico shall be borne by the Spanish-American Department, Mr. S. E. Halberstadt shall render to said department a statement of said ex-

316 penses, and the amount of same shall be deducted from the advance made to him to meet his expenses. Should any money be left over, Mr. S. E. Halberstadt agrees to return it to the Spanish-American Department.

30. The amount which Mr. S. E. Halberstadt remains to owe to the Sub Department of Chili and Bolivia, and which shall be determined as soon as the general balance of said Sub-Department down to the 30th of June last is made, shall be paid back by Mr. S. E. Halberstadt out of the renewal commissions corresponding to him and out of the interest he may have in the business of said Sub-Department
317. pending liquidation.

Should the proceeds of same not be sufficient to satisfy Mr. S. E. Halberstadt's indebtedness to the Sub-Department of Chili and Bolivia, the company or the Spanish-American Department shall designate what fraction Mr. S. E. Halberstadt shall devote out of his part of profits in the Sub Department of Mexico to the extinction of his debt.

31. It is also agreed that S. E. Halberstadt agrees to abide by all instructions given him by medical inspectors or others when they are sent to Mexico by the company or the Spanish-American Department vested with special powers.

318 In faith of which we have signed the present contractin duplicate this second day of September, 1889, in the year one thousand eight hundred and eighty-nine.

PARIS, 2nd September, 1889.

(Signed) J. SANCHEZ,
General Manager of the Spanish-American Department of The New York Life Ins. Co.
" S. E. HALBERSTADT.
" J. C. FONTANA, testigo.
" E. FABRE, "

It is agreed, as an additional part of the contract 319
dated September 2nd, 1889, signed by Mr. Joaquin Sanchez as Director General of the Spanish American Department of the New York Life Insurance Company, and Mr. Sigismundo Ernesto Halberstadt, as manager of the Mexican Sub-Department, that the commissions which the former will pay to the latter on ten payment life policies shall be thirty-five per cent. (35%) instead of thirty per cent. (30%) as stipulated in said contract, Mr. Halberstadt renounces, in consideration of that concession to the five per cent. (5%) mentioned in Art. No. 17 on all policies on the ten and fifteen year endowment plans obtained through all his agents and on ten payment life policies obtained through the agents Messrs. W. 320
B. Tappan and M. Rhode.

Signed in duplicate in the City of New York, this eighteenth day of September, 1889.

SPANISH-AMERICAN DEPARTMENT OF THE NEW YORK LIFE INSURANCE COMPANY.

(Signed) J. MERZBACHER, General Manager.
" S. HALBERSTADT,
" C. COLOM, Witness.
" A. CHAUDON, "

Additional clauses to the contract between J. Sanchez, General Manager of the Spanish American Department of the New York Life Insurance Company, and Mr. S. E. Halberstadt, signed in Paris, on September 2nd, 1889. 321

Between the Spanish American Department of the New York Life Insurance Company, parties of the first part, and Mr. S. E. Halberstadt, party of the second part, the following agreement, additional to the contract referred to above, has been entered into:

322 1. Article 18 of said contract shall read thus hereafter: "In case the profit and loss account of the Sub-Department of Mexico should not, at the end of any one year, show a profit of $6,000 (six thousand dollars) Amer. gold, the New York Life Insurance Company, or the Spanish American Department of said company, agree to make good the difference so as to complete the sum of $6,000 (six thousand dollars) Amer. gold.

2. It is agreed and understood that although the annual guarantee given to Mr. S. E. Halberstadt amounts to $6,000 (six thousand dollars) Amer. gold, he shall be entitled to draw only $6,000 (six
323 thousand dollars) Mexican silver, for his personal wants, that is to say that he shall draw only $500 (five hundred dollars) Mexican silver, monthly, and the proceeds of the exchange of $6,000 (six thousand dollars) Amer. gold, into its equivalent in Mexican silver, shall be credited to his account against the sums which he owes to the Sub-Department of Mexico, as well as to the Sub Department of Chili, and which are as follows:

To the Sub-Department of Chili:

a/c 1882/6	$2,396.22 Amer. gold.		Two thousand three hundred and ninety-six dollars and twenty cents.
a/c 1886/7	4,172.20	" "	Four thousand one hundred and seventy-two dollars and twenty
324 cents.
a/c 1888/89	5,792.29	" "	Five thousand seven hundred and ninety-two dollars twenty-nine cents.
E. and O. E.	$12,360.71		Twelve thousand three hundred and sixty dollars and seventy-one cents.

To the Sub-Department of Mexico:

Up to April 30, 1890,	$5,209.25	Mexican silver five thousand two hundred and nine dollars and twenty-five cents.

plus the corrections as enumerated in our letter of this date, and any other amounts which he may have taken since April 30, to this date.

3. It is agreed and understood that should the 325
profits earned by the Sub-Department of Mexico in any one year exceed the guarantee of $6,000 (six thousand dollars) American gold, given to Mr. S. E. Halberstadt, the latter shall dispose of only one 50% (fifty per cent.) of the amount of the surplus, and the remaining 50% (fifty per cent.) shall be credited to him against the debts as enumerated above.

4. As an addition to Art. 7 of this contract, it is agreed and understood that of the fiduciary funds of the company in his trust, Mr. S. E. Halberstadt shall be authorized to dispose of part or whole of $10,000 (ten thousand dollars) Amer. gold, with which to make the necessary advances to his sub-agents, &c., 326
and the amounts owed by such sub agents to whom advances shall have been made out of said appropriation shall have to appear in the monthly balance sheets, as well as in the general balances which the Sub-Department of Mexico is obliged to send to the Spanish-American Department. No sub-agent shall be let to owe to the Sub-Department of Mex. a sum superior to $2,000 (two thousand dollars) Mex. silver.

5. It is understood and agreed that the debit balance of the general expenses account, as well as all debit balances of all auxiliary accounts opened under impersonal denominations; such as traveling 327
account, rent account, &c., which are closed by transferring their respective balances to the general expenses account or to the profit and loss account, shall be included in the amount of $10,000 (ten thousand dollars) Amer. gold mentioned in Art. 4 of this additional agreement, with the exception, however, of the balance of Mr. S. E. Halberstadt's account.

6. It is understood and agreed that under no circumstances shall Mr. S. E. Halberstadt dispose of any fraction of the above mentioned appropriation

328 for his own use, or open accounts of any denomination whatever, without previous authorization of this Spanish-American Department.

7. It is understood and agreed that whenever there shall be sufficient reason to consider as lost an advance made to a sub-agent, the amount of said advances shall be entered in the profit and loss account, and transferred afterwards to the "doubtful accounts."

8. It is understood and agreed that Mr. S. E. Halberstadt shall not consider the power of attorney given by the Spanish-American Department as a
329 part of his contract, and he shall never avail himself of any provision in said power for misconstruing any clause of the contract which he holds. The spirit of said power of attorney is that it shall be used by S. E. Halberstadt solely in accordance with the clauses of his contract and with the instructions which he may receive from time to time from the Spanish-American Department.

9. It is agreed and understood that S. E. Halberstadt is authorized by the Spanish-American Department to appoint Mr. Francisco Pazos as sub-manager of the Sub-Department of Mexico, but the allowance to such party for his services as such sub-
330 manager shall be borne entirely by the Sub-Department of Mexico, and no indemnity shall be due by the Spanish-American Department to said Sub-Department of Mexico for this appointment. The contract to be made between Mr. S. E. Halberstadt and Mr. F. Pazos shall be submitted to the approval of the Spanish-American Department. A circular informing of this appointment shall be drawn up and signed by the Spanish-American Department.

Should Mr. F. Pazos be obliged at any time to assume the management of the Sub-Department of Mexico on account of Mr. Halberstadt's absence or sickness, he shall have to abide strictly by the rules

of the Company and by the instructions which he may receive from time to time from the Spanish-American Department. Mr. F. Pazos shall in this case sign all documents jointly with the accountant or with his cashier. 331

10. As an addition to Art. 17 of the contract above mentioned, it is understood and agreed that out of the extra premium of 5% (five per cent.) allowed to Mr. S. E. Halberstadt in all cases where an agent appointed prior to his administration is given commissions superior to his, and which are enumerated in Art. 12 of said contract, Mr. S. E. Halberstadt shall have to pay the commission due to banker and collecting agents for collection. 332

11. It is agreed and understood that all other articles of the above mentioned contract signed in Paris on the 2d September, 1889, which have not been altered by this additional agreement shall remain in force.

In faith of which we have signed the present additional agreement in duplicate in the City of New York on the twentieth day of June, in the year one thousand eight hundred and ninety.

SPANISH-AMERICAN DEPARTMENT OF THE NEW YORK LIFE INSURANCE CO.

J. SANCHEZ,
General Manager. 333

S. E. HALBERSTADT.

334 **Defendant's Exhibit No. 2 for Identification.**—June 11, 1893. U. S. Circuit Court, in evidence.

S. E. HALBERSTADT, Esq.,
Presente.

Dear Sir:

The object of this letter is to confirm to you the verbal agreement into which we l ve entered, viz.:

1. You shall make in the books of the Sub-Department of Mexico under you charge the various entries which will be enumerated in a special letter
335 to that effect, so as to annul the final balance which you have closed in said books on the 31st of December, 1889, which final balance, in accordance with the spirit of your contract, ought not to have been drawn up until a period of twelve months had been completed from the date of your taking charge of said Sub Department.

2. It is understood and agreed that from the Account of Expenses which you have rendered for your traveling expenses from Chili to Mexico, we shall deduct the amount of $632.42 Mex. silver, equivalent at 37% of $481.62 Amer. gold, which amount you shall debit to your personal account in the books of the Sub-Department of Mexico.
336

4. Having proved you conclusively that you had no authority to open in the books of the Sub-Department of Mexico an account denominated "Furniture Account," it is understood that you are not allowed to reopen in future in said books accounts of this nature, or any other accounts that are to be liquidated by the carrying over to your personal account, or to that of profit and loss, the balances which they may show at the end of each one year, unless authorized to do so by the Spanish-American Department.

Upon your arrival at Mexico you shall debit your 337
personal account with the debit balance that said furniture account now shows.

4. You shall debit the General Expenses account in the books of the Sub-Department of Mexico with $241.15 Mex. silver, which you have unduly charged for rent of an office at Merida, having no authority from us to do so, and for sundry telegrams, vouchers of which are returned to you in special letters.

5. It is agreed that the amount of $270 Mexican silver advanced to Cassavecchia by the Spanish American Department shall be charged to said party 338
and should said amount be never paid back, the loss of it shall be borne by the account called "doubtful accounts" considering this item as belonging to the period prior to your administration.

6. As a special favor and considering that you have wrongfully interpreted the sense of Art. 17 of your contract, we will admit your charge of the 2% representing $207.57 Mex. silver, which matter has been fully discussed between us, but it must be well understood that this exception shall never be invoked by you as a precedent.

Without anything further, we remain, dear sir,

Very truly yours, 339

SPANISH AMERICAN DEPARTMENT OF THE
NEW YORK LIFE INSURANCE CO.
(Signed), J. SANCHEZ.

Contents approved.
(Signed,) S. E. HALBERSTADT.

340 **Exhibit "B" for Plaintiff.**

This exhibit consists of eight pages, divided each into seven columns on the first pages and at the top whereof occcurs the following:

"THE NEW YORK TIMES,

Vol. XL.—No. 12,489. New York, Saturday September 5, 1891. Price, 2 cents."

And on the eighth page whereof occurs, amongs other things, the following:

341 "This is the situation in the Beers' Mutual Admiration Society at Broadway and Leonard Street. Everything is done to avoid publicity and to screen the truth. Not one of the twenty men composing the Board of Trustees, save those two or three who hold executive offices, knew of the Merzbacher defalcation until The *Times* exposed it. Not one of these men, these alleged guardians of trust funds, knows that Halberstadt, Beers' Mexican agent, is short in his accounts $28,000, and yet this same Halberstadt, while standing in the barroom of the Hoffman House early last March, surrounded by such men as Merzbacher and Dinkelspiel, boasted of the manner in which he was helping himself to the company's
342 funds."

Exhibit "C" for Plaintiff. 343

This exhibit consists of ten pages, divided each into seven columns; on the first page and at the top whereof occurs the following:

"THE NEW YORK TIMES,

Vol. XLI.—No. 12,510. New-York, Wednesday, September 30, 1891. Price, two cents."

And on the eighth page whereof occurs, amongst other things, the following:

"The policy of the New York Life with reference to its defaulting agents in Spanish America furnishes another explanation of the distrust with which the company has long been regarded by the policyholders in Rio. The career of John Davis, for instance, is familiar to everybody in the tropics who takes an interest in insurance matters. Davis, it will be remembered, handled a business of $9,000,000 a year in Mexico. He led a fast life, and when he disappeared one day his accounts were found to be short $30,000. No attempt was made to arrest him. The career of the two agents who immediately preceded Davis is equally notorious in the tropics. 344

"These agents, or one of them at least, owed his appointment to the defaulter Merzbacher. Their shortage was found to be $60,000. Neither of them was arrested. The case of the intemperate German agent, who was found to be short in his accounts $12,000 in Chili, and who was subsequently transferred to Mexico, is another familiar story. This agent was not only not punished, but he was transferred to another agency. Then came the defaulter Merzbacher, with a shortage of $700,000 standing opposite his name. The news of his defalcation was received in Brazil with astonishment 345

346 and alarm, emotions that were intensified when it became known that no arrests had been made and that President Beers had been seen in company with the defaulter in London."

Exhibit "D" for Plaintiff.

This exhibit consists of eight pages divided each into seven columns on the first page and at the top whereof occurs the following:

"THE NEW YORK TIMES,

347 Vol. XLI.—No. 12,519. New-York, Saturday, October 10, 1891. Price two cents."

And on the eighth page whereof occurs, amongst other things, the following:

"The notoriously bad character of the agents whom Mr. Beers employs to do the work of the New-York Life insurance Company is a theme that constantly presents new features and new attractions. Dinkelspiel, Merzbacher, Webber, Stoddart, Moore, Halberstadt, Davis and Vanuxem are names that stand at the head of the list of Mr. Beers' warm personal friends and admirers, and to each of these men he had given valuable appointments with unlimited
348 opportunities to swindle and deceive the policy-holders. The readers of the *Times* are entirely familiar with the methods and the extent to which the agents named have availed themselves of those opportunities."

Exhibit "E" for Plaintiff. 349

This exhibit consists of twenty pages divided each into seven columns on the first page and at the top whereof occurs the following:

"THE NEW YORK TIMES,

"Vol. XLI.—No. 12,537. New York, Sunday, November 1, 1891—Twenty pages. Price five cents."

And on the third page whereof occurs, amongst other things, the following:

"WHAT THE BOOKS CONTAIN. 350

PROOF OF PRESIDENT BEERS' WRETCHED MANAGEMENT.

If the records of the Spanish-American Department of the New York Life have not been altered there is trouble ahead."

* * * * * *

"Since the present feeling of distrust of the company's management arose, efforts have been made to enlighten a deceived lot of policyholders concerning the abuses of various sorts committed by Messrs. Beers, Merzbacher, Dinkelspiel, Sanchez and others; but, notwithstanding all that has been said, it is evident to those who, like myself, are acquainted with 351 the management of the Spanish-American department, that there are details of an important nature lacking. It is a fact that the most immoral methods of doing business prevail in that department, and that the arch conspiritor who, next to Beers, is responsible for those immoralities, is Sanchez himself. His very questionable methods of doing business have, it is true, won him the reputation of writing from $25,000,000 to $30,000,000 of new insurance annually, but it is not generally known that the methods by which this new business is secured

352 are notoriously unfair to the policyholders. He and his sub-agents have made use of all sorts of exaggerations and deceits in Spanish-America, where the insuring public is completely ignorant of life insurance, and where the most improbable stories as to the conditions of policies and the results that will accrue from them may be told with perfect safety. It is openly stated among those who know the facts that when the company's Spanish-American endowment and tontine policies mature there will be a panic in that department even more serious than the distrust and suspicion which now threaten to overthrow Mr. Beers."

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353 **Exhibit "F" for Plaintiff.**

Cable address,
Nylicsad, Barcelona.

SPANISH-AMERICAN DEPARTMENT
of the
"NEW YORK LIFE INSURANCE COMPANY."
Central Office,
Paseo De Ysabel Segunda No. 3.

Please address all correspondence to:
J. SANCHEZ, Manager,
Spanish-American Department of the New York
354 Life Insurance Company,
Apartado, 67, Barcelona, Spain.

BARCELONA, Dec. 29th, 1891.

CONTESTADO Ene 22, 1892. RECIBIDO, 22 Ener, 92.

S. E. HALBERSTADT, Esq., Manager,
Mexico.

Dear Sir:

The end of the present year drawing near, we beg to tender you our sincere thanks, for your valuable assistance during its course in obtaining a satisfactory result in our Department. Your endeavors are

highly appreciated, and we sincerely trust that during 1892 you will continue the same. We would like to obtain during the coming year, with regard to new business, a result surpassing that of any preceding year, and we count upon your valuable assistance in reaching that end. 355

We wish you a happy and prosperous new year, and beg to remain,

Dear Sir,

Very truly yours,

SPANISH-AMERICAN DEPARTMENT OF THE
"NEW YORK LIFE INSURANCE CO."
p. p. J. SANCHEZ,
General Manager.
A. DARLOT WALLERSTON. 356

Exhibit "G" for Plaintiff.

Direccion para telegramas,
Nylicsad, New York.

DEPARTAMENTO HISPANO-AMERICANA
de la
"NEW YORK LIFE INSURANCE CO."
(Compania de Segures de Vida),
Oficina Central, 346 y 348 Broadway,
Salon, No. 18.

Sirvanse dirijir la correspondencia asi: 357
Direccion del Departamento Hispano-Americano de la New-York Life Insurance Co.
P. O. Box 2727, New York.

NUEVA YORK, Diciembre 27, 1888.

Senor DON S. E. HALBERSTADT,
Antofogasta.

Muy appreciado Senor y amigo nuestro:

Estando próximo á terminer el corriente año, nos es grato aprovechar esta ocasión para ofrecerle nuestras mejores felicitaciones y deseos de prosperidad en

el próximo nuevo año, esperando que todo lo que emprenda sea coronado del mas completo exito.

El año que esta próximo á terminar ha sido muy próspero y la marcha de los negocios en ese Sub Departamento muy satisfactoria, y debe Ud considerarse orgulloso de los resultados que ha alcanzado con su hábil manejo é intelligente asiduidad en la dirección que ha dado á los negocios.

Esperamos que en el próximo repita Ud los mismos buenos resultados y que, si posible, los supere con creces. Estos son nuestros más vehementes deseos y con estos sentimentos nos es grato reiterarle la expresión de nuestra mas sincero aprecio y de repetirnos como siempre de Ud.

Afectisimos Amigos,

DEPARTAMENTO HISPANO-AMERICANO DE LA
NEW YORK LIFE INSURANCE CO.
J. SANCHES,
Director General.

Exhibit "H" for Plaintiff. 361

Direccion para telegramas,
Nylicsad, New York.

DEPARTAMENTO HISPANO-AMERICANO
de la
"NEW YORK LIFE INSURANCE Co."
(Compania de Seguros de Vida.)
Oficina Central, 346 y 348 Broadway,
Salon, No. 18.
Sirvanse dirijir la correspondencia asi:

Direccion del Departamento Hispano-Americano de la New York Life Insurance Co. 362
P. O. Box 2727, New York.

NUEVA YORK, Julio 16, 1888.

(*Personal.*)

Señor DON S. E. HALBERSTADT,
Santiago de Chile.

Muy estimado Señor y amigo nuestro:

Tenemos el gusto de contestar su grata 14 de Junio ppdo, dirijida particularmente á nuestro Señor Merzbacher, por la cual llama Ud nuestra atención á un artículo publicado en el *Pall Mall Budget* de 12 363 de Abril, 1888, página 28, por el cual supone Ud que La Mutual Life Insurance "is getting ahead of us in England."

La experiencia debe haberle demostrado que los anuncios de la prensa sobre este particular no son un barometro bien exacto de la verdad de los hechos. Creemos per nuestros informes que todo esto no es mas que un "powerful humbug" para llamar la atención del público. Sin embargo nada de particular tiene que una Compañia sea mas favorecida en

364 un pais que otra, por el público, pero de esto no se debe deducir nada de desfavorable para una ú otra. En todo caso debe consolarle ampliamente que en su Sub Departamento estamos ahora á la cabeza de todos los demás, gracias á la habilidad desplegáda por nuestro personal directivo, en el cual tiene Ud una gran parte.

Congratulámosle por el resultado de los negocios en los cua tro últimos meses, que montan á $1,200,000—solarmente entre Tacna, Pisagua, Iquique y Antofagasta. Que sigan así son nuestros mas vehementes deseos, pues en ello encontraran Uds toda la debida remuneracíón á su hábil trabajo.

Con un apretón de manos nos suscribimos de Ud.

365 Afmos Amigos y S. S.,

DEPARTAMENTO HISPANO-AMERICANO DE LA
NEW YORK LIFE INSURANCE CO.
J. SANCHES,
Director General.

366

Exhibit "I" for Plaintiff. 367

Direccion para telegramas,
Nylicsad, New York.

DEPARTAMENTO HISPANO-AMERICANO
de la
"NEW YORK LIFE INSURANCE CO."
(Compania de Seguros de Vida),
Oficina Central, 346 y 348 Broadway,
Salon No. 18.

Sirvanse dirijir la correspondencia asi:

Direccion del Departamento Hispano-Americano de la New York Life Insurance Co. 368

P. O. Box 2727, New York.

NUEVA YORK, Junio 26, 1888.

Sor. Dn. D. E. HALBERSTADT,
Santiago de Chile.

Muy Senor nuestro:

Tenemos el gusto accusarle recibo de sus gratas desde Iquique:

Marzo 17.	Re.....	Temporary Policies.
Marzo 24.	Re.....	Applications obtained.
Marzo 31.	Re.....	Mutual Life Insurance Company. 369

En contestación á la primera debemos decirle que hemos sometido su contenido á nuestro presidente y que estamos haciendo todo lo posible para tratar de obtener sus indicaciones El asunto no será muy fácil pués ya Ud sabe los sentimentos de conservacion que tiene tan arragiados la Compañia y por consigui ente lo dificil que es obtener algun cambio de esta naturaleze. En breve esperamos poderle participar lo que

370 hemos conseguido sobre el particular. Inútil decirl-
que desde luego comprendemos la justicia de sus ar-
gumentos.

Lo congratulamos sinceramento sobre la cantidad de Seguros obtenidos por Ud y confiamos en que seguira Ud en esta buena via de la cual obtendrá Ud personalmente opíparos resultados.

En cuanto a la Mutual Life de que trata su carta, debemos participarle que esta Campañia ha desistido de operar en su territorio y que todos los negocios que nos traspasaron á nosotros se los ha llevado el viento y que solamente se pudo llevar á cabo un seguro de £1000.00.00 de Arequipa.

Su grata de Abril 6 dirijida personalmente á
371 nuestro Sor Merzbachér y en la cual adjuntaba Ud un duplicado de la que escribia personalmente á nuestro Sor Sanchez en igual fecha, fué debidamente recibida y como la última fué contestada, largamente por el mismo, no requirere hoy nueva mención.

Somos de Ud. Afmos amigos y Seguros Sare vidores.

DEPARTAMENTO HISPANO-AMERICANO DE LA
NEW YORK LIFE INSURANCE CO.
J. SANCHES,
Director-General.

372

Exhibit "J" for Plaintiff. 373

EXECUTIVE DEPARTMENT
of the
NEW YORK LIFE INSURANCE COMPANY.

JOHN A. McCALL,
President,
346 & 348 Broadway.

NEW YORK, 28th May, 1892.

RECIBIDO
6 Junio, 92.

S. E. HALBERSTADT, Esq., 374
Sub-Department of Mexico,
City of Mexico, Mexico.
Re New York Times.

Dear sir:

Your favor of the 19th inst. was duly received and contents noted. In reply, in the temporary absence of the President, we would say that in reply to your telegram of the 19th inst. we telegraphed you as follows: "We cannot comply with your suggestion. We have nothing further to say at present," and presume our telegram reached you in due course.

As our first telegram to you was solely in what seemed to us to be the general interest of the Company, and as you do not find that you can meet 375
our views therein expressed, except upon conditions entirely beyond our control, there remains nothing farther to be said and nothing farther to be done except to let the whole matter drop on the part of the Company.

Yours truly,
CHAS. C. WHITNEY,
Secretary.

376 **Exhibit "K" for Plaintiff.**

Direccion para telegramas:
Nylicsad, New York.

DEPARTAMENTO HISPANO-AMERICANO
DE LA
"NEW YORK LIFE INSURANCE CO."
(Compania de Seguros de Vida),
Oficina Central, 346 y 348 Broadway,
Salon No. 18.

Sirvanse dirijir la correspondencia asi:
Direccion del Departamento Hispano-Americano de
377 la New York Life Insurance Co.
P. O. Box 2727, New York.

NUEVA YORK, B Junio 11, 1888.

(*Personal.*)

Senor DN. S. E. HALBERSTADT,
Santiago de Chile.

Muy estimado Senor y amigo:

Tengo el gusto de acusarle ercibo de su grata 6 de Abril ppdo, llegada á mis manos en 5 del corriente. *W. B. Inglis* #271336

Sobre la muerte de este asegurado escribirá á Ud esta Oficina oficialmente. No veo aparentemente
378 ninguna causa para demorar este pago, y si las pruebas de muerte vienen en orden indudablemente pronto se mandara pagar este siniestro. *Avance de $2000.00 m. c.*

Me dice Ud que la Oficina de Santiago le exijió una garantia para esta suma. Esto obedece á que cuando nuestro mutuo amigo Wallerstein me comunico la necesidad que tenia Ud de este avance, me indicó en su nombre que queria Ud ofrecer una garantia especial y yo copie de su carta textualmente lo que el indicaba al ordenar a la Oficina de Santiago le hiciera el avance. Veo que ha habido un mal entendido, puesto que no se encuentra Ud satisfecho

porque se le haya pedido esta garantia. Yo no tengo in 379
conveniente en eliminarla y escribo hoy a la Oficina de Santiago que ponga á su disposicion esta suma sin la dicha garantia deduciendola de sue parte de utilidades en el futuro balance de fin del corriente año. Si en esa epoca le fuera pesada la deduccion, podremos prolongarla por algun tiempo por el todo ó parte de ello, y segun ne indique Ud oportunamente, arreglaremos el particular. *Tirantrez entre su Oficina y Ud.*

Leo con verdadera pena que apenas salido de esa, se deja ya sentir tirantez entre Ud y sus compañeros, cuando debia reinar la mas perfecta armonia y amistad entre usetedes que, despues de todo, son socios. No se quien tiene la culpa de lo que occurre, 380
puesto que solo tengo sus informes, y para juzgar se necesita oir los dos lados. Desde luego, amigo Halberstadt, conozco su caracter impetuoso y algo independiente y me temo que alguna coso inocente de su parto haya causado las cartas insolentes, que segun Ud dice, le han dirijido sus compañeros. Es preciso que cada uno ponga un poco de su parte para vivir de acuerdo y evitar estos desagrados que no deben existir, cada cual haciendo las concessiones necesarias conforme al caracter y susceptibilidad be las personas con quienas trata. Todo el mundo no puede tener el mismo tacto y diplomacia para guiarse en la viday es preciso que aquel que tiene dotes superiores los ponga en juega y dé el ejemplo para 381
asi evitar desagrados como los que ahora ocurren. Le suplico que ponga algo de su parte para llevarse en buena armonia con sus compañeros y yo voy a escribir á estos en el mismo sentido á vir si logro asi poner fin a esta tirantez que no debe exister Confio pues que Ud tratara de complacerme en esto en consideracion de la amistadque me ha de mostrado Ud desde que nos conocimos.

382 *Contrato.*

Debo confesarie, mi querido Halberstadt, que encuentro que es Ud al go impaciente y que es tám-bien algo prematura su pretension de que al fin del año se camble su contrato, aumentendale su percentaje de beneficios en un 5% Apenas hace un semestre que su contrato fué hecho y yá esta Ud descontento l'Porque no lo penso mejor y no me indocó, durante mi estadia en esa, claramente y francamente sus ambiciones, que hubiera sido mucho mas facil satisfacerlo que no ahora á esta distancia que me encuentro clavado aqui, como lo es toy, a causa de la enfermedad de mi esposa? Conozco bastante la nobleza de sus sentimentos y su manera
383 de ser recta y leal para suponer un momento que quiera Ud sacar ninguna ventaja de esta situacion en que me encuentro. El perder su cooperacion, es inutil pensarlo; jamas lo permitire. Tenga confianza en mi sea paciente, que yo no echaré en olvido sus pretensiones y que al contrario tengo á Ud muy presente em mi mentepara oportunamente empujarlo. Será dificil por correspondencia quitar le al Sor Fesser el 5% que Ud desea de mas. Toy á probarlo no obstante en obsequio suyo, aunque en el fondo creo es injusto lo que voy hacer, pues si bien hoy este tiene una sinecura con su puesto, no debemos olvidar que él fué el que organizó primitivamente esas Oficinas, y que dada sue edad y su delicada salud,
384 seria injusto dejarlo hoy en el aire, cuando durante el largo periodo que estuvo al frente de esa, ha estado sembrando y perdiendo dinero sin beneficio alguno. Repitole que con todo voy á probar de arreglar el 5% que Ud desea de mas, pero tambien es preciso que, conseguido este, Ud no vuelva á pedirnos nuevo cambio, como lo hace Ud hoy, sobre todo despues de haber pasado tan corto periodo de tiempo desde jue se efectuaron nuestros arreglos.

De cualquier manera, amigo mio, cuento con Ud y espero que ni por un momento acariciara Ud la

idea de abandonarnos pues repitole que no lo per- 385
mitre, "hablo en sentido amistoso" sino que al contrario forma Ud una parte fuertemente adherida del Spanish American Department en el cual espero, con el tiempo, verlo al frente de otros puestos mas luctativos. Su porvenir esta á lado, nadie lo apreciari como nosotros, ni lo tratara tampoco como nosotros. No olvide esto y sobre todo que soy su amigo y tengo las exigencias naturales del aprecio que le profeso.

Saludo á su Senora. Censervese bueno, muchos negocios, mucha diplomacia, menos susceptibilidad y cuente siempre con mi amistad sincera.

J. SANCHEZ.

P. S. Carruage. 386

Antes de recibir su carta del 17 de Marzo ppdo sabre este particular, ya habiamos orderado a la casa Desmarest y Co el carruage que Ud deseabeal cual esta casi concluido y sera embarcado conforme a las instrucciones de Ud, a la consignacion de los Sres Alejandro Visscher & Co., Mollendi, via Colon en uno de los proximos vapores un duplicado de la factura y el conocimiento del carruage los enviaremos á Ud á Santiago. Esperamos que todo llegará felizmente y oportunamente á su poder y que en sus paseos en esos desiertos se acordara Ud a veces de la amigo Sanchez.

387

388 **Exhibit "L" for Plaintiff.**

Via Galveston.

COMPANIA TELEGRAFICA MEXICANA.

Recedibo y entregado.	725		Tip de B Nichols Sucr. Mexico.
	65	38	3.31 P

N. York. RECIBIDO,
18 Mayo, 92.

Nylic,
Halberstadt,
Mexico.

S. E. Halberstadt,
May 19, 1892,
Mexico.

389 Adapt fickles abutment *New York Times* amma delegate deacon ammonia hucking awfully canute aladdin flabby hubert abolish cement similar gravy chamber fangled flabby arab suffer bluff agitation deacon old coquettes differ chess colonel ingersoll amma wire deacon huckle desire.

McCALL, Pres't.

Exhibit "M" for Plaintiff.

Via Galveston.

Despachado. Estacion de
COMPANIA TELEGRAFICA MEXICANA.

Se aceptan despachos en las Estaciones de la Com-
390 pania para trasmision a todas partes del mundo.

No. del despacho.	Prefijo	Fecha	Hora		$ cs.
			H	Tasa para la M compania A Desbolsar	
Palabras Por Mi	Trasmitido	A	A las H	M	Total

All suits against *N. Y. Times* by order of B. of Trustees have been discontinued I ask that you will act at once in similar way. In your case, so company will not suffer from agitation of old matters. Please instruct Col. Ingersoll by wire of your desire.

Exhibit "N" for Plaintiff. 391

Via Galveston.

Despachado. Estacion de

COMPANIA TELEGRAFICA MEXICANA.

Se aceptan despachos en las Estaciones de la Compania para trasmision a todas partes del mundo.

No. del despacho.	Prefijo	Fecha	Hora H M		$ cs.
				Tasa para la Compania A desbolsar	
Palabras	Trasmitido Por Mi	A	A las H M	Total	

Nylic. McCall,
New York.

My	Cramp 392
reputation	reputation
has been	Brocade
damaged	damaged
greatly	greatly
by	Amma
New York	New York
Times	Times
repeated	repeated
publications	publications
Impossible	Cedar
settle	explode
this	Freak
matter	Coquette
by	Amma
wire	wire 393
If	Catechise
Company	Agna
pay	diana
expenses	Bengal
will leave:	
here for :	Hateful
New York	DorRisk
and	adria
try to	Garner
arrange	arrange
matter	corporal

394 And inasmuch as the said matters produced and given in evidence on the said trial, and the said exceptions do not appear by record of the said cause in the Circuit Court of the United States for the Southern District of New York, the defendant has prepared and caused to be settled this bill of exceptions as a record thereof in accordance with the statutes of the United States, which said bill of exceptions the said Court hereby signs and orders on file this 12th day of May, 1893.

N. SHIPMAN,
Circuit Judge.

(Endorsed)—U. S. Circuit Court.—Sigismundo E.
395 Halberstadt, Plaintiff, against Henry A. Morgan, &c., Defendant.—Bill of Exceptions.—Townsend, Dyett & Einstein, Attorneys for Deft. Applt., 247 Broadway, New York City.—A copy this day received.—Dated N. Y., Mar. 8, '93.—R. H. Griffin, Atty. for Plff.—U. S. Circuit Court.—Filed May 12, 1893.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

396 SIGISMUNDO E. HALBERSTADT

AGAINST

HENRY A. MORGAN, President of the *New York Times*.

The plaintiff in error in this case makes the following assignment of errors:

FIRST.—The Court erred in admitting in evidence certificate of the *New York Times*, a joint stock association, under the laws of 1885, filed in the

office of the Clerk of the City and County of New 397
York, January 9, 1891, marked Plaintiff's Exhibit A, and which is as follows:

"Certificate filed by the *New York Times*, a joint "stock association, under the Laws of 1885, Chap- "ter 505.

"1. Name of association—*The New York Times.*

"2. Date of its organization—August 5, 1851.

"3. Laws or statute under which it is organized "and does business. No special law or statute or "any general law; common law association.

"4. Number of associates required thereby— "Seven.

"5. Number of associates of *The New York* 398 "*Times*—Seven.

"6. Its principal place of business—City of New "York.

"7. Name and places of residence of its officers— "Henry A. Morgan, president, residing at Aurora, "County of Cayuga, State of New York. George "Jones, secretary and treasurer, residing at City of "New York.

"Dated at the City of New York, January 6, 1891.

"(Signed) HENRY A. MORGAN, President.

"GEORGE JONES, Treasurer.

"City and County of New York, ss.: Henry A. "Morgan, being duly sworn, says: That he is the 399 "President of the joint stock association the *New* "*York Times*, and that the foregoing certificate is "true.

"HENRY A. MORGAN.

"Sworn to before me }
"January 7, 1891. }

"E. W. MOSHER,

"Notary Public,

"City and County of New York."

"City and County of New York, ss.: George "Jones, being duly sworn, deposes and says: He is

400 "Treasurer of the joint stock association the *New* "*York Times*, and that the foregoing certificate is "true.

"GEORGE JONES.

"Sworn to before me }
"January 8, 1891. }
"EUGENE C. MAUBORGNE,
"Notary Public,
"New York.

"Filed and recorded 9th of January, 1891, 12 "hours 10 minutes."

SECOND.—The Court erred in permitting the plaintiff to amend the fifth paragraph of the complaint
401 so that the same reads as follows:

"*Fifth.*—That on the 5th day of September, 1891, "the defendant said joint stock association, known "as and called the *New York Times*, of which the "said Henry A. Morgan was and is the president, "maliciously published in the said *New York Times*, "&c."

And to similarly amend the said averments of the complaint by inserting after the word "defendant" the words "the said joint stock association known "as and called the *New York Times*, of which the "said Henry A. Morgan was and is the presi- "dent."

402

THIRD.—The Court erred in admitting the following evidence of Gilbert Edward Jones, a witness for plaintiff:

"Q. In what business is that association engaged? "A. Publishing a newspaper.

"Q. What is the name of that paper? A. The "*New York Times.*"

FOURTH.—The Court erred in refusing to instruct the witness Gilbert E. Jones that if his answer to the question, "In what business is the New York

Times Association engaged?" would tend to criminate him, he has a right to refuse to answer. 403

FIFTH.—The Court erred in refusing to instruct the witness Gilbert E. Jones that if his answer to the question, "What is the name of that paper?" would tend to criminate him, he has a right to refuse to answer.

SIXTH.—The Court erred in admitting the following evidence of the witness Gilbert E. Jones:

"Q. Has the paper been published for several "years? A. Yes."

SEVENTH.—The Court erred in refusing to direct the witness Gilbert E. Jones that if his answer to the question, "Has the paper been published for several years?" would tend to criminate him, he had a right to refuse to answer. 404

EIGHTH.—The Court erred in admitting the following evidence of the witness Gilbert E. Jones:

"Q. Did it discontinue the publication of the "paper any one year that you have known it? A. "Not that I know of."

NINTH.—The Court erred in refusing to instruct the witness Gilbert E. Jones that if the question, "Did "it discontinue the publication of the paper during "any one year that you have known it," would criminate him, he has the right to refuse to answer. 405

TENTH.—The Court erred in instructing the witness that the question, "Did it discontinue the publica-"tion of the paper during any one year that you "have known it," did not tend to criminate him and in directing him to answer the same.

ELEVENTH.—The Court erred in admitting in evidence a copy of the *New York Times*, headed "*New York Times*, New York, Saturday, September 5,

406 1891. Price two cents," and on the top of each page being headed with the words: "*New York Times*, New York, Saturday, September 5, 1891. Price two cents."

TWELFTH.—The Court erred in admitting in evidence a copy of the *New York Times*, headed "*New York Times*, New York, Wednesday, September 30, 1891," and the top of each page being headed with the words: "*New York Times*, New York, Wednesday, September 30, 1891."

THIRTEENTH.—The Court erred in admitting in evidence a copy of the *New York Times*, headed "*New York Times*, New York, Saturday, October 10,
407 1891. Vol. XLI., No. 12,519," and the top of each page being headed with the words, "*New York Times*, Saturday, October 10, 1891."

FOURTEENTH.—The Court erred in admitting in evidence a copy of the *New York Times*, headed "*New York Times*, New York, Sunday, November 1, 1891. Vol. XLI., No. 12,537. Price five cents," and the top of each page being headed with the words, "*New York Times*, Sunday, November 1, 1891."

FIFTEENTH.—The Court erred in excluding the answer of the witness Wallerstein to the question:

408 "Q. Did you not inform me before you went "upon the stand that you had the information that "this furniture went to his private house and not "into the office of the company."

SIXTEENTH.—The Court erred in charging the jury as follows:

"The articles in the *New York Times* are charged "in the complaint to be each and every one libelous. "The explanation or, as it is called in legal phrase, "the innuendo, which is given in the complaint of "the meaning of the articles represents that the arti-

"cles were libelous. In my opinion, gentlemen, 409
"each article was in fact libelous."

SEVENTEENTH.—The Court erred in charging the jury as follows:

"Now, if you find that the explanation made by "the plaintiff is true and that he was not, as be- "tween himself and the company, short in his ac- "counts, implying embezzlement, by failure to ac- "count and remit, then damages—the actual "damages--are to be given to remunerate the plain- "tiff for the actual injury to his feelings and reputa- "tion which he has improperly suffered."

EIGHTEENTH.—The Court erred in refusing to 410
charge the defendant's request:

"That no part of the following language used in "the third cause of action is libelous: 'The noto- "'riously bad character of the agents whom Mr. "'Beers employs to do the work of the New York "'Life Insurance Company is a theme that con- "'stantly presents new features and new attrac- "'tions. Dinkelspiel, Merzbacher, Webber, Stod- "'dard, Moore, Halberstadt, Davis and Vanuxem "'are names that stand at the head of the list of "'Mr. Beers' warm personal friends and admirers, "'and to each of these men he has given valuable "'appointments with unlimited opportunities to "'swindle and deceive the policyholders. The 411
"'readers of the *Times* are entirely familiar with "'the methods and the extent to which the agents "'named have availed themselves of those oppor- "'tunities.'"

NINETEENTH.—The Court erred in refusing to charge the defendant's request:

"That the words in the article of September 5, "1891, 'Halberstadt, Beers' Mexican agent, is "'short in his account $28,000,' do not necessarily "impute dishonesty."

412 TWENTIETH.—The Court erred in charging that the entire article of September 5, 1891, as set forth in the complaint is libelous.

TWENTY-FIRST.—The Court erred in refusing to charge the defendant's request:

"That the words of the article of September 30, "'was found short in his accounts $12,000 in Chili,' "do not necessarily impute dishonesty."

TWENTY-SECOND.—The Court erred in refusing to charge that the words of the article of September 30, 1891, "Who was found to be short in his accounts $12,000 in Chili," are justified by the evidence.

413

TOWNSEND, DYETT & EINSTEIN,
Attorneys for Defendant
and Plaintiff in Error,
247 Broadway,
New York.

(Endorsed)—U. S. Court.—S. E. Halberstadt, Plaintiff, against H. A. Morgan, President, &c., Defendant.—Assignment of Errors.—Townsend, Dyett & Einstein, Attorneys for Defendant, 247 Broadway, New York City.—U. S. Circuit Court.—Filed May 17, 1893.—John A. Shields, Clerk.

414

CIRCUIT COURT OF THE UNITED STATES 415
OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Second Circuit.

SIGISMUNDO E. HALBERSTADT vs. HENRY A. MORGAN, President of the New York *Times*.	Bond for damages and costs.

416

KNOW ALL MEN BY THESE PRESENTS, That we Gilbert E. Jones and Henry L. Dyer are held and firmly bound unto the above named Sigismundo E. Halberstadt in the sum of seventeen thousand dollars, to be paid to the said Sigismundo E. Halberstadt, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the 12th day of April, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, the above named Henry A. Morgan, 417
President of the *New York Times*, intends to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Second Circuit to reverse the judgment rendered in the above entitled suit by the Judge of the Circuit Court of the United States for the Southern District of New York, on the 13th day of March, 1893, in favor of the plaintiff above named, Sigismundo E. Halberstadt,

Now, therefore, the condition of this obligation is such, that if the above named Henry A. Morgan,

418 President of the *New York Times*, shall prosecute the said writ of error to effect and answer all damages and costs, if he shall fail to make his plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GILBERT E. JONES, [SEAL.]
HENRY L. DYER, [SEAL.]

Sealed and delivered and taken and acknowledged this 12th day of April, 1893, before me.

FRANCIS T. GRIBBINS,
[SEAL.] Notary Public,
Queens County.
Certificate filed in N. Y. Co.

419

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

GILBERT E. JONES and HENRY L. DYER, each for himself, being duly sworn, deposes and says: That he is a resident and householder of the State of New York and that he is worth the sum of seventeen thousand dollars over and above all his just debts and liabilities.

GILBERT E. JONES.
HENRY L. DYER.

Sworn to this twelfth day of April, A. D. 1893, before me.

FRANCIS T. GRIBBINS,
420 Notary Public,
Queens County.
Certificate filed in N. Y. Co.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—Sigismundo E. Halberstadt *vs.* Henry A. Morgan, as President, &c.—Bond for damages and costs on writ of error.—Townsend, Dyett and Einstein, 247 Broadway, Attys. for Deft. Applt.—Approved May 16, 1893, E. H. Lacombe.—U. S. Circuit Court.—Filed May 17, 1893.—John A. Shields, Clerk.

UNITED STATES OF AMERICA. 421

THE PRESIDENT OF THE UNITED STATES TO SIGISMUNDO E. HALBERSTADT, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Second Circuit, to be held at New York City on the 13th day of June, 1893, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Henry A. Morgan, President of the *New York Times*, is plaintiff in error, and you are defendant in error, to show cause, if any there 422
be, why the judgment in the said writ of error mentioned shall not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of New York, in the Southern District of New York, in the Second Circuit, this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

E. H. LACOMBE.

(Endorsed)—U. S. Circuit Court.—Sigismundo E. Halberstadt, Plaintiff, against Henry A. Morgan. &c., Defendant.—Citation.—Townsend, Dyett & Einstein, Attorneys for Defts., 247 Broadway, New York City.—Service of a copy 423
of the within citation is hereby admitted.—Dated New York, May 18, 1893.—Robert H. Griffin, Attorney for Plff.—U. S. Circuit Court.—Filed May 19, 1893.—John A. Shields, Clerk.

424 UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

SIGISMUNDO E. HALBERSTADT,
Defendant in Error,

AGAINST

HENRY A. MORGAN, as President of the New York Times,
Plaintiff in Error.

425

Writ of error to the Circuit Court for the Southern District of New York. Plaintiff sued defendant for a libel published in the *New York Times* and recovered a verdict for $15,000, upon which judgment was duly entered on March 13, 1893.

LACOMBE, *Circuit Judge:*

The complainant sets out four causes of action, based on separate articles which appeared in the defendant's newspaper on September 5, September 30, October 10 and November 1, 1891, respectively.

426 The first of these is as follows:

"This is the situation in the Beers' Mutual Admiration Society at Broadway and Leonard street. Everything is done to avoid publicity and to screen the truth. Not one of the twenty men composing the Board of Trustees, save those two or three who hold executive offices, knew of the Merzbacher defalcation until *The Times* exposed it. Not one of these men, these alleged guardians of trust funds, knows that Halberstadt, Beers' Mexican agent, is short in his accounts $28,000, and yet this same Halberstadt, while standing in the barroom of the

Hoffman House early last March, surrounded by 427
such men as Merzbacher and Dinkelspiel, boasted of
the manner in which he was helping himself to the
company's funds."

The second is as follows:

"The policy of the New York Life with reference to its defaulting agents in Spanish-America furnishes another explanation of the distrust with which the company has long been regarded by the policyholders in Rio. The career of John Davis, for instance, is familiar to everybody in the tropics who takes an interest in insurance matters. Davis, it will be remembered, handled a business of $9,000,000 a year in Mexico. He led a fast life, and when he disap- 428
peared one day his accounts were found to be short $30,000. No attempt was made to arrest him. The career of the two agents who immediately preceded Davis is equally notorious in the tropics.

"These agents, or one of them at least, owed his appointment to the defaulter Merzbacher. Their shortage was found to be $60,000. Neither of them was arrested. The case of the intemperate German agent, who was found to be short in his accounts $12,000 in Chili, and who was subsequently transferred to Mexico, is another familiar story. This agent was not only not punished, but he was transferred to another agency. Then came the defaulter Merzbacher, with a shortage of $700,000 standing 429
opposite his name. The news of his defalcation was received in Brazil in astonishment."

The third is as follows:

"The notoriously bad character of the agents Mr. Beers employs to do the work of the New York Life Insurance Company is a theme that constantly presents new features and new attractions. Dinkelspiel, Merzbacher, Webber, Stoddart, Moore, Halberstadt, Davis and Vanuxem, are names that stand at the head of the list of Mr. Beers' warm per-

sonal friends and admirers, and to each of these men he had given valuable appointments with unlimited opportunities to swindle and deceive the policyholders. The readers of the *Times* are entirely familiar with the methods and the extent to which the agents named have availed themselves of those opportunities."

The fourth is as follows:

"Since the present feeling of distrust of the company's management arose, efforts have been made to enlighten a deceived lot of policyholders concerning the abuses of various sorts committed by Messrs. Beers, Merzbacher, Dinkelspiel, Sanchez and others, but notwithstanding all that has been said, it is evident to those who, like myself, are acquainted with the management of the Spanish-American Department, that there are details of an important nature lacking. It is a fact that the most immoral methods of doing business prevail in that department, and that the arch-conspirator who, next to Beers, is responsible for these immoralities, is Sanchez himself. * * * He and his sub-agents have made use of all sorts of exaggerations and deceits in Spanish America, where the insurance public is completely ignorant of life insurance, and where the most improbable stories as to conditions of policies and the results that will accrue from them may be told with perfect safety. * * * S. E. Halberstadt is another one of the company's agents to whom attention must be drawn if the company's affairs in Spanish-America are to be thoroughly exposed. This man is said to have been a defaulter while in the employ of the New York Life in Peru and Chili. He has been for some years the company's representative in Mexico, where his accounts have steadily run in arrears, as he himself boasted one night at the Hoffman House in this city. The entire staff of the Spanish-American Department have been witnesses to the scandalous quarrels that

took place between Merzbacher and Halberstadt in the former's private office in this city. One of the most remarkable things about this man's career is the freedom with which he talks about the officers of the company, notably President Beers and his son-in-law, Berthelot. Halberstadt was a candidate for Merzbacher's position, but he has not obtained it yet. Another agent who has stolen the company's money in Spanish-America was until very recently manager at Buenos Ayres." 433

There was evidence showing that the plaintiff was the person referred to by name, and in the second article, as "the intemperate German agent."

1. Plaintiff in error assigns error in the instructions to the jury, in that the Circuit Judge charged as follows: 434

"The articles in the *New York Times* are charged in the complaint to be each and every one libelous. The explanation (or, as it is called in legal phrase, the innuendo) which is given in the complaint of the meaning of the article represents that the articles were libelous. In my opinion, gentlemen, each article was in fact libelous."

To which charge defendant duly excepted.

The very authorities cited by the plaintiff in error abundantly sustains this part of the charge. They hold that the language used must be given its ordinary meaning; that the test is whether in the mind of an intelligent man the language naturally imports a criminal or disgraceful charge; that the language is to be understood by the Court in the sense in which the world generally would understand it, giving to the words their ordinary meaning; that the language is to be understood in the ordinary and most natural sense, and that when the writing complained of is plain and unambiguous the question in 435

436 a civil action whether it is a libel or not is a question of law.

Hayes *v.* Ball, 72 N. Y., 420.
More *v.* Bennet, 48 N. Y., 472.
Williams *v.* Godkin, 5 Daly, 599.
Weed *v.* Foster, 11 Barb., 203.
Snyder *v.* Andrews, 6 Barb., 43.

To which list of authorities may be added Rue *v.* Mitchell, 2 Doll., 58, holding that "the sense in which words are received by the world is the sense which courts of justice ought to ascribe to them" on the trial of actions such as this.

Plaintiff in error apparently concedes upon his
437 brief that the Court correctly construed the language of the second and fourth articles, but contends that the first and third were ambiguous and should have been left to the jury. The contention is frivolous. No intelligent man reading these articles could fail to understand that the author of the first one charged an agent through whose hands money of a corporation passed not only with being short in his accounts $28,000, but also with openly boasting of the manner in which he was helping himself to the company's funds. Nor could the intelligent reader fail to understand that the third article charged that Halberstadt had been given unlimited opportunities to swindle and deceive the
438 policyholders, and had availed himself of such opportunities. If these excerpts do not charge the crime of embezzlement, they do certainly charge disgraceful conduct, exposing the party assailed to odium and contempt. And there is no ambiguity about the language used.

Defendant's counsel asked the Court to charge that the words in the first article, "Halberstadt, Beers' Mexican agent, is short in his accounts," do not necessarily impute dishonesty. The Court charged that "these simple words do not necessarily and of themselves, without anything else in the case, impute dishonesty," but added that "the

entire article as set forth in that clause of the complaint is libelous." This was all defendant was entitled to, for the article must be considered as a whole, and if as a whole it is libelous, the circumstance that it contains some innocuous statements will not relieve defendant from responsibility for its publication. 439

The exceptions to this part of the charge are therefore unsound.

2. The plaintiff in error further contends that the Circuit Judge erred in refusing to charge as requested by defendant's counsel that the "words of the article of September 30th [second article], 'who was found to be short in his accounts $12,000 in Chili' are justified by the evidence." 440

This request was made after the Court had charged the jury. They had already been instructed that in accordance with the accounts between the company and the plaintiff, the plaintiff appeared to owe the company various sums of money, which the Court enumerated, aggregating over $22,000. Their attention was also called to the explanation of this indebtedness proffered by the plaintiff, viz.: that these several amounts were for traveling expenses and excessive expenses in the business of the company in entering upon new fields of labor, and were to be repaid to the company out of plaintiff's commissions as they might mature. And it was left to them to find whether in view of the explanation the plaintiff was, as between himself and the company, short in his accounts, implying embezzlement by failure to account and remit. 441

Having already told the jury that the face of the accounts showed the plaintiff to be indebted to the company as stated, the Court was under no obligation to repeat that statement in the precise words of defendant's request.

3. Plaintiff in error further contends that the Circuit Court erred in allowing plaintiff to amend his complaint.

442 Upon the trial motion was made to amend the fifth paragraph of the complaint so as to read "That on the 5th day of September, 1891, the defendant, *the said joint stock association known as and for the New York Times, of which the said Henry A. Morgan is president*, maliciously published in the said New York *Times*, &c." The words inserted by this amendment are those in italics. And to similarly amend the several averments of the complaint under each cause of action. Defendant objected to the amendments "as in effect introducing a new party to the action," and reserved an exception.

The summons and complaint were entitled "Sigismundo E. Halberstadt *vs.* Henry A. Morgan,
443 President of the New York *Times*," and the complaint averred that "the New York *Times* was and still is an unincorporated joint stock association, consisting of seven or more associates, having its principal place of business in the City of New York," and that "the defendant Henry A. Morgan was and now is the president of said association, the said association being engaged * * * in the business of publishing, circulating and vending a daily newspaper known as and called "The New York *Times*," the said association being * * * a citizen and resident of the State of New York."

It is provided by Section 1919 of the New York Code of Civil Procedure that: "An
444 action * * * may be maintained against the president or treasurer of such an association * * * for any cause of action, for or upon which the plaintiff may maintain such an action * * * against all the associates." And Section 1921 of the same Code provides that: "In such an action * * * a judgment against the officer against whom it is brought does not authorize an execution to be issued against his property or his person; nor does the docketing thereof bind his real property or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the Sheriff to satisfy the

same out of any personal property belonging to the 445
association."

The amendment therefore is not obnoxious to the objection taken by defendant. It did not introduce any new party, since under the operation of these sections Morgan was only the nominal defendant, the real defendant being the association.

National Bank *vs.* Vanderwerker, 74 N. Y., 234.

4. Upon the trial the plaintiff called as a witness Gilbert E. Jones, who testified that he was and during the period covered by the complaint had been a shareholder in the New York Times Association, and also its treasurer. Against the objection 446
of defendant's counsel he further testified that such association at the times referred to was engaged in publishing a newspaper, known as the "New York *Times;*" that its place of business was in New York City at Park Row and Spruce street, in the building known as "The Times Building;" that its newspaper had been published for several years; that its circulation was large, and that during the time he knew it its publication had not been discontinued.

The ground of the objection as stated on the record are that "the witness is privileged from answering, the object of the questions put to him being to try to prove the publication of a libel, and the witness, being a shareholder in the New York *Times* 447
Association, is privileged from answering." Defendant's counsel also asked the Court to instruct the witness that if his answer to the questions would tend to criminate him he had the right to refuse to answer. The Court held that his answers would not tend to criminate him, and directed him to answer. The record does not show that the witness himself asserted any privilege, and he did answer. Exceptions were duly reserved; and the rulings of the Circuit Court are assigned as error.

It is sufficient answer to the contention of plaintiff in error to refer to the well-settled principle that

448 such privilege belongs exclusively to the witness. The party to the suit has no right to insist upon it, except when he is himself witness. And if the witness waives his privilege, or if the Court disregards it and requires him to answer, the party has no right to interfere or complain of the error.

Cloyes *v.* Thayer, 3 Hill, 564.
Southard *v.* Rexford, 6 Cowen, 255.
Ward *v.* People, 6 Hill, 144.
People *v.* Carroll, 3 Park. Crim., 73.

5. The testimony of Jones remaining in the case, the exception to the admission of the copies of the New York *Times* newspaper is manifestly un-
449 sound.

Judgment affirmed.

(Endorsed)—U. S. Circuit Court of Appeals, Second Circuit.—Sigismundo E. Halberstadt, Deft. in Error, *vs.* Henry A. Morgan, as President of the New York *Times*, Plff. in Error.—Opinion, Lacombe, *J.*—United States Circuit Court of Appeals, Second Circuit.—Filed Mar. 13, 1894.—John A. Shields, Clerk.

450

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held in the Post Office Building in the City of New York, on the 13th day of March, 1894. 451

Present—Hon. WILLIAM J. WALLACE, *C. J.*
Hon. E. HENRY LACOMBE, *J.*

HENRY A. MORGAN, as President of *The New York Times*,
Plaintiff in Error, 452

AGAINST

SIGISMUNDO E. HALBERSTADT,
Defendant in Error.

The defendant in error having heretofore and on or about the 13th day of March, 1893, duly entered judgment for the sum of $15,177.45, damages and costs, against the plaintiff in error in the United States Circuit Court for the Southern District of New York, and the plaintiff in error having thereafter and on or about the 16th day of May, 1893, sued out 453 a writ of error directed to the said Circuit Court from the said judgment, and the transcript of the record herein having been duly filed in this Court, argument on the said writ of error having duly come on to be heard before us on the 31st day of January, 1894,

Now, on the said transcript of record, and after hearing Benjamin F. Einstein, Esq., of counsel for the plaintiff in error, in support of the said writ of

454 error, and the plaintiff in error's assignment of errors, and after hearing Robert H. Griffin, in opposition thereto, and due deliberation having been had, it is

Ordered, adjudged and decreed, that said judgment of the United States Circuit Court for the Southern District of New York, be, and it hereby is, in all things affirmed, with costs, to the defendant in error, to be taxed, and that a mandate issue to the said United States Circuit Court for the Southern District of New York accordingly.

E. H. L.

455

456

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held in the Post Office Building in the City of New York, on the 28th day of March, 1894. 457

Present—Hon. WILLIAM J. WALLACE, *C. J.*
E. HENRY LACOMBE, *J.*

HENRY A. MORGAN, as President of *The New York Times*,
Plaintiff in Error,

AGAINST

SIGISMUNDO E. HALBERSTADT,
Defendant in Error. 458

On reading and filing the motion papers hereto annexed, and after hearing B. F. Einstein, Esq., in favor of the said motion, and Robert G. Ingersoll, Esq., in opposition thereto, now, on motion of Einstein & Townsend, attorneys for the plaintiff in error, it is

Ordered, that the issuing of a mandate to the United States Circuit Court upon the judgment of affirmance entered in this action, be and the same is hereby stayed until the first day of May, 1894. 459

Enter.

(A copy.)

[SEAL.] JOHN A. SHIELDS,
Clerk.

460 UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

I, JOHN A. SHIELDS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages contain a true copy of the record, order of affirmance, opinion by Judge Lacombe and order staying the issuing of a mandate in the case of Henry A. Morgan, as President of *The New York Times*, plaintiff in error, against Sigismundo E. Halberstadt, defendant in
461 error, as the same remains upon the files and records of the said United States Circuit Court of Appeals for the Second Circuit, and of the whole thereof.

Seal, United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals at the City of New York, this 27th day of April, 1894.

JOHN A. SHIELDS,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Office Supreme Court U. S.
FILED.
APR 30 1894
JAMES H. McKENNEY,
CLERK.

1198

Supreme Court of the United States.

HENRY A. MORGAN, AS PRESIDENT OF THE NEW YORK TIMES,
Petitioner and Plaintiff in Error,

against

SIGISMUNDO E. HALBERSTADT,
Defendant in Error.

PETITION FOR WRIT OF CERTIORARI.

EINSTEIN & TOWNSEND,
Attorneys for Petitioner and Plaintiff in Error

JOHN C. PENNIE, ESQ.,
Counsel.

ROBERT H. GRIFFIN, ESQ.,
Attorney for Defendant in Error.

Evening Post Job Printing House, New York.

Supreme Court of the United States. 1

HENRY A. MORGAN, as President
of *The New York Times*,
Petitioner and Plaintiff in error,

AGAINST

SIGISMUNDO E. HALBERSTADT,
Defendant in error.

Please take notice, that upon a certified copy of 2
the transcript of record to the United States Circuit Court of Appeals for the Second Circuit herein. upon a certified copy of the opinion of the said United States Circuit Court of Appeals, and upon the annexed petition of Henry A. Morgan, a motion will be made in the Supreme Court of the United States at Washington, D. C., on the 30th day of April, 1894, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari*, requiring the United States Circuit Court of Appeals for the Second Circuit to certify to this Court for its review and determination 3
the above entitled case.

Dated New York, April 23, 1894.

Yours, &c.,

EINSTEIN & TOWNSEND,
Attys. for Petitioner & Plff. in error,
32 Liberty St.,
N. Y. City.

To ROBERT H. GRIFFIN, Esq.
Atty. for Deft. in error.

4 SUPREME COURT OF THE UNITED STATES.

HENRY A. MORGAN, as President of *The New York Times*, Petitioner and Plaintiff in error,

AGAINST

SIGISMUNDO E. HALBERSTADT, Defendant in error.

5 TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Henry A. Morgan, the plaintiff in error in the above entitled action, respectfully shows:

That at the commencement of this action the above named plaintiff in error was the president of *The New York Times*, a joint-stock association doing business in the City of New York and organized under the laws of the State of New York, and that the defendant in error was at the said time a citizen or subject of the Kingdom of Denmark. That this action was begun on the second day of December, 1891, in the United States Circuit Court for the
6 Southern District of New York, and was brought to recover damages for the publication of four articles that appeared in the newspaper, *The New York Times*, on September 5, September 30, October 30 and November 1, 1891, which were claimed by the defendant in error to be libellous; that the case was tried before the Honorable Nathaniel Shipman, Circuit Judge, and a jury, on January 19, 1893, and the jury found a verdict for the plaintiff in the sum of $15,000. That the plaintiff in error feeling himself aggrieved by the said judgment, sued and obtained a writ of error to

the United States Circuit Court of Appeals for the 7
Second Circuit; that the said appeal duly came on to be heard before Mr. Justice Wallace and Mr. Justice Lacombe (Mr. Justice Shipman being disqualified from hearing the same), and on March 19, 1894, the said Justices of the United States Circuit Court of Appeals declined to certify to this Court any questions of law for instructions, and affirmed the judgment of the Circuit Court in all respects. That on the 28th day of March, 1894, an order was entered in the said Circuit Court of Appeals staying the issue of a mandate herein to the Circuit Court until the first day of May, 1894, to permit the plaintiff in error to apply to this Court for a writ of *certiorari*, requiring the said United States Circuit 8
Court of Appeals for the Second Circuit to certify to this Court for review and determination this case.

This application is accompanied, in accordance with subdivision III. of Rule 27, by a certified copy of the entire record of the case and also by a certified copy of the opinion of the United States Circuit Court of Appeals, written by Mr. Justice Lacombe, to both of which your petitioner begs leave to refer.

That the reason for this application is that your petitioner deems this case to be one of gravity and importance, in that the verdict is one of the largest ever given by a jury in this country in an action for libel, and more particularly in that there was raised on appeal to the United States Circuit Court of Ap- 9
peals a novel question of law upon which rested the plaintiff's entire case, and one which, though not strictly a constitutional question, verges closely thereon, and is of the gravest importance, involving the right of a trial Judge to compel a witness against his will to give testimony which might subject him to a criminal charge, as appears more fully in the following paragraphs:

On the trial the counsel for the plaintiff moved to amend the fifth paragraph of the complaint, so as to read:

10 "FIFTH.—That on the 5th day of September, "1891, the defendant, the said joint stock associa- "tion known as and for the 'New York Times,' "&c., and to similarly amend the several amend- "ments of the complaint under each cause of ac- "tion, by inserting after the word 'defendant' the "words 'the said joint stock association known as "and for the New York Times,' of which the said "Henry A. Morgan was and is president."

The counsel for defendant objected to these amendments on the ground that they would introduce a new party to the action. The motion was granted, and the defendant excepted (fols. 11 80–81).

The plaintiff, for the purpose of proving that the *New York Times* was an unincorporated and joint stock association, consisting of seven or more associates, introduced in evidence a certificate filed by the association in the office of the Clerk of the City and County of New York on January 9, 1891 (fols. 75 to 80).

The plaintiff called as a witness Gilbert E. Jones for the purpose of proving that the association, the *New York Times*, was engaged in the business of publishing the newspaper, the *New York Times*, and that it published the articles in question. 12

The following is what occurred upon the trial at this point:

"By Mr. Ingersoll: Are you the secretary of the "New York Times Association? A. I am treasurer.

"Q. In what business is that association en- "gaged?

"Objected to on the ground that the witness "is privileged from answering, the object of "the question being to try to prove the pub- "lication of a libel, and the witness, being a

" shareholder in the New York Times Associa- 13
" tion, is privileged from answering:

" By Mr. Einstein:

" Q. Were you a shareholder in the *New York*
" *Times* on September 5, 1891? A. I was.
" Q. And you are still a shareholder? A. I am.
" Q. And have been since that time? A. Yes.

" Mr. Ingersoll states that he is not trying to
" prove the publication of a libel, but is trying
" to prove in what business the association is
" engaged.

" Question allowed. Exception by defendant.

14

" By Mr. Ingersoll:

" Q. In what business is the New York Times As-
" sociation engaged?

" Mr. Einstein asks the Court to instruct the
" witness that if his answer to that question
" will tend to criminate him he has the right to
" refuse to answer.

" The Court: I do not think it will tend to crimi-
" nate the witness. He may answer.

" Exception by defendant.

" A. Publishing a newspaper.
" Q. What is the name of the paper?

" Mr. Einstein objects to the question and re- 15
" quests the Court to give the same instruction.

" Question allowed. Exception by defendant.

" A. The *New York Times.*
" Q. Has the paper been published for several
" years?

" Same objection and request for instruction
" made by Mr. Einstein.

" Question allowed. Exception by defendant.

" A. Yes. The circulation of the *Times* is fairly
" large in the United States. I suppose it also goes

16 "to foreign countries. I cannot tell if it goes to "Mexico.

"Q. Did it discontinue the publication of the "paper during any one year that you have known it?

"Objected to on the same ground.

"The Court: By the word "during," do you mean "throughout the year?

"Mr. Ingersoll: I mean at any time during the "year. Did he know of the discontinuance of the "paper at any time since he has known it?

"The Court: I will allow that question.

"Mr. Einstein: I ask the witness to assert his "privilege.

17 "The Court: I instruct him that that question "does not tend to criminate him.

"Mr. Einstein: The witness does assert his privi-"lege, and your Honor does direct him to answer?

"The Court: Yes.

"Exception by defendant.

"Witness: What is the question?

"Mr. Ingersoll: Did the association known as *The* "*New York Times* discontinue the publication of "the paper at any time since you have known it?

"The Witness: Not that I know of" (fols. 82 to 88).

18 That bearing upon these rulings the plaintiff in error made the following assignments of error:

"THIRD.—The Court erred in admitting the fol-"lowing evidence of Gilbert Edward Jones, a witness "for plaintiff.

"Q. In what business is that association engaged? "A. Publishing a newspaper.

"Q. What is the name of that paper? A. The "*New York Times.*"

"FOURTH.—The Court erred in refusing to instruct "the witness, Gilbert E. Jones, that if his answer

"to the question, 'In what business is the *New* 19
"*York Times* Association engaged?' would tend to
"criminate him, he has a right to refuse to answer.

"FIFTH.—The Court erred in refusing to instruct
"the witness, Gilbert E. Jones, that if his answer
"to the question, 'What is the name of that paper?'
"would tend to criminate him, he has a right to
"refuse to answer.

"SIXTH.—The Court erred in admitting the follow-
"ing evidence of the witness Gilbert E. Jones:

"Q. Has the paper been published for several
"years? A. Yes.

20

"SEVENTH.—The Court erred in refusing to direct
"the witness, Gilbert E. Jones, that if his answer
"to the question, 'Has the paper been published for
"several years?' would tend to incriminate him, he
"had a right to refuse to answer.

"EIGHTH.—The Court erred in admitting the fol-
"lowing evidence of the witness, Gilbert E. Jones:

"Q. Did it discontinue the publication of the paper
"any one year that you have known it? A. Not
"that I know of."

"NINTH.—The Court erred in refusing to instruct 21
"the witness Gilbert E. Jones that if the question,
"'Did it discontinue the publication of the paper
"'during any one year that you have known it?'
"would criminate him, he has the right to refuse
"to answer."

"TENTH.—The Court erred in instructing the wit-
"ness that the question, 'Did it discontinue the pub-
"'lication of the paper during any one year that
"'you have known it?' did not tend to criminate him,
"and in directing him to answer the same" (fols.
402–405, Transcript of Record).

That the learned Justice writing the opinion of the Circuit Court of Appeals paid no further attention to this point raised by the writ in error than to say in passing, "It is a sufficient answer to the contention of plaintiff in error to refer to the well-settled principle that such privilege belongs exclusively to the witness. The party to the suit has no right to insist upon it except when he is himself the witness. And if the witness waives his privilege, or the Court disregards it and requires him to answer, the party has no right to interfere or complain of the error" (see paragraph 4 of Opinion).

That the plaintiff in error is a banker of responsibility and financial standing, who resides in the City of Albany, New York, and that the judgment is secured by bonds of Gilbert E. Jones and Henry L. Dyer, each of whom is a resident and freeholder in the City of New York, and each of whom has qualified for the sum of $17,000. That the plaintiff in error feels himself to be aggrieved by the decision of the Circuit Court of Appeals, in which decision only two Judges were able to join.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a certain day to be therein designated, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in the said cause entitled as Henry A. Morgan, as President of the *New York Times*, against Sigismundo E. Halberstadt, defendant in error, to the end that said cause may be reviewed and determined by this Court, as provided in Section 6 of the Acts of Congress, entitled "An Act to establish the Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this

Court may seem proper and in conformity with the provisions of said act, and that the said judgment of the said Court of Appeals in the said cause and every part thereof may be reversed by this Honorable Court. 25

And your petitioner will ever pray, &c., &c.

HENRY A. MORGAN,
By BENJAMIN F. EINSTEIN,
His Attorney.

STATE OF NEW YORK,
City and County of New York, } ss.:

Personally appeared Benjamin F. Einstein, who being duly sworn on his oath, says: That he is one of the attorneys of Henry A. Morgan, the petitioner above named, and as such had personal charge for him of the case in the foregoing petition mentioned in the Circuit Court of the United States for the Southern District of New York and in the United States Circuit Court of Appeals for the Second Circuit; that he has read the said petition by him subscribed and that the facts therein stated are true. 26

BENJAMIN F. EINSTEIN.

Sworn to before me and subscribed in my presence this 24th day of April, 1894.

FRANCIS T. GRIBBINS,
Notary Public,
Queens County. 27
Certificate filed in New York Co.

1198

Office Supreme Court U. S.
FILED.
APR 30 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

HENRY A. MORGAN, as President of THE NEW YORK TIMES,
Plaintiff in Error,

against

SIGISMUNDO E. HALBERSTADT,
Defendant in Error.

BRIEF AND ARGUMENT FOR PETITIONER.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN C. PENNIE, Esq.,
Of Counsel.

Supreme Court of the United States.

HENRY A. MORGAN, as President of *The New York Times*,
Plaintiff in Error,

AGAINST

SIGISMUNDO E. HALBERSTADT,
Defendant in Error.

Brief for Plaintiff in Error:

The action was brought to recover damages for the publication of four articles that appeared in the newspaper *The New York Times* on September 5, September 30, October 10 and November 1, 1891, which were claimed by the plaintiff to be libelous, and was tried before Hon. Nathaniel Shipman, Circuit Judge, and a jury on January 19, 1893. The jury found verdict for the plaintiff for $15,000.

The complaint contains four causes of action, each of which is based upon one of the above mentioned articles, and each alleges that *The New York Times* was an unincorporated joint stock association, consisting of seven or more associates; that Henry A. Morgan was, prior to and at the time of the commencement of the action, president of the association, and that "the defendant

"maliciously published in the said *New York Times*, "and caused to be circulated throughout the United "States and elsewhere," the article complained of as being libelous (fols. 13, 17, 18, 21, 24 and 27).

The answer denies all these allegations (fol. 38).

On the trial, the counsel for the plaintiff moved to amend the fifth paragraph of the complaint, so as to read as follows:

"FIFTH.—That on the 5th day of September, "1891, the defendant, the said joint stock associa- "tion known as and for the *New York Times*," &c., and to similarly amend the several amendments of the complaint under each cause of action, by inserting after the word "defendant" the words "the "said joint stock association known as and for the "*New York Times*, of which the said Henry A. "Morgan was and is president."

The counsel for defendant objected to these amendments on the ground that they would introduce a new party to the action. The motion was granted, and the defendant excepted (fols. 80–81).

The plaintiff, for the purpose of proving that the *New York Times* was an unincorporated and joint stock association, consisting of seven or more associates, introduced in evidence a certificate filed by the association in the office of the Clerk of the City and County of New York on January 9, 1891 (fols. 75 to 80).

The plaintiff called as a witness Gilbert E. Jones for the purpose of proving that the association The New York Times was engaged in the business of publishing the newspaper *The New York Times*, and that it published the articles in question.

The following is what occurred upon the trial at this point:

"By Mr. Ingersoll:

"Are you the Secretary of the New York Times "Association? A. I am treasurer.

" Q. In what business is that association engaged?

" Objected to on the ground that the witness " is privileged from answering, the object of the " question being to try to prove the publication " of a libel, and the witness, being a shareholder " in the New York Times Association, is privi- " leged from answering.

" By Mr. Einstein:

" Q. Were you a shareholder in the *New York* " *Times* on September 5, 1891? A. I was.
" Q. And you are still a shareholder? A. I am.
" Q. And have been since that time? A. Yes.

" Mr. Ingersoll states that he is not trying to " prove the publication of a libel, but is trying to " prove in what business the association is engaged.

" Question allowed. Exception by defendant.

" By Mr. Ingersoll:

" Q. In what business is the New York Times " Association engaged?

" Mr. Einstein asks the Court to instruct the wit- " ness that if his answer to that question will tend " to criminate him he has the right to refuse to " answer.

" The Court: I do not think it will tend to crimi- " nate the witness. He may answer.

" Exception by defendant.

" A. Publishing a newspaper.
" Q. What is the name of the paper?

" Mr. Einstein objects to the question and " requests the Court to give the same instruc- " tion.
" Question allowed. Exception by defendant.

" A. *The New York Times.*

"Q. Has the paper been published for several "years?

"Same objection and request for instruction "made by Mr. Einstein.

"Question allowed. Exception by defendant.

"A. Yes. The circulation of the *Times* is fairly "large in the United States. I suppose it also goes "to foreign countries. I cannot tell if it goes to "Mexico.

"Q. Did it discontinue the publication of the "paper during any one year that you have known "it?

"Objected to on the same ground.

"The Court: By the word 'during' do you mean "throughout the year?

"Mr. Ingersoll: I mean at any time during the "year. Did he know of the discontinuance of the "paper at any time since he has known it?

"The Court: I will allow that question.

"Mr. Einstein: I ask the witness to assert his "privilege.

"The Court: I instruct him that that question "does not tend to criminate him.

"Mr. Einstein: The witness does assert his privi-"lege, and your Honor does direct him to answer.

"The Court: Yes.

"Exception by defendant.

"Witness: What is the question?

"Mr. Ingersoll: Did the association known as The "New York Times discontinue the publication of "the paper at any time since you have known it?

"The Witness: Not that I know of" (fols. 82 to 88).

POINTS.

I.

The learned Appellate Court erred in holding that Circuit Judge did not err in compelling the witness Gilbert E. Jones to answer the questions put to him as to the business of the association *The New York Times* and in overruling the objections made to those questions by defendant's counsel.

Libel is an offense at common law and by statute in the State of New York. An unincorporated joint stock association is a mere partnership, and every member of the association is liable, civilly and criminally, for the publication of a libel by the association.

Mr. Jones, being a member or shareholder of the association, was privileged from answering any question which would disclose the business of the association or tend to prove the publication of a libel, on the ground that such answer would tend to criminate him.

In the case of Counselman *v.* Hitchcock, 142 U. S., 547, Blatchford, *J.*, uses the following significant language:

" It is an ancient principle of the law of evidence, " that a witness shall not be compelled, in any pro- " ceeding, to make disclosures or to give testimony " which will tend to criminate him or subject him " to fines, penalties or forfeitures," and cites the following authorities in support of that proposition:

Rex *v.* Slaney, 5 Car. & P., 213.
Cates *v.* Hardacre, 3 Taunt., 424.
Maloney *v.* Bartley, 3 Camp., 210.
1 Stark. Ev., 71–191.

Sir John Friend's Case, 13 How. St. Tr., 16.
1 Green. Ev., Sec. 451.
1 Burr's Trial, 244.
Whart. Crim. Ev. (9th Ed.), Sec. 463.
Southard *v.* Rexford, 6 Cow., 255.
People *v.* Mather, 4 Wend., 229.
Lister *v.* Boker, 6 Blackf., 439.

While the constitutional privilege is perhaps limited to a criminal case, the common law privilege extended to civil and criminal cases. In other words, under the common law a witness could not be compelled, in a civil or a criminal action, to give testimony which would tend to incriminate him.

By the provision of the Constitution of the United States the national legislature cannot change this common law rule, and by the Constitution of this State, the legislature cannot do so in criminal cases.

Section 860 of the Revised Statutes of the United States provides that "no answer or other pleading "of any party and no discovery or evidence ob- "tained by means of any judicial proceeding from "any party or witness in this or any foreign "country, shall be given in evidence, or in any "manner used against such party or witness, or "his property or estate, in any Court of the United "States, or in any proceeding by or before any "officer of the United States in respect to any "crime or for the enforcement of any penalty or for- "feiture by reason of any act or omission of such "party or witness: Provided, That nothing in this "Act shall be construed to exempt any party or "witness from prosecution and punishment for per- "jury committed by him in discovering or testify- "ing as aforesaid."

In the case of Counselman *v.* Hitchcock (*supra*), Mr. Justice Blatchford, in discussing the applicability of that section to that case and the extent to

which it affects the constitutional and common law privilege of a witness, says:

"It remains to consider whether Section 860 of "the Revised Statutes removes the protection of "the constitutional privilege of Counselman, that no "evidence obtained from a witness by means of a "judicial proceeding shall be given in evidence, or "in any manner used against him or his property "or estate, in any court of the United States, in any "criminal proceedings, or for the enforcement of "any penalty or forfeiture. It follows, that any "evidence which might have been obtained from "Counselman by means of his examination before "the grand jury, could not be given in evidence or "used against him in any court of the United States, "in any criminal proceeding or for the enforcement "of any penalty or forfeiture. This of course pro- "tected him against the use of his testimony against "him or his property, in any prosecution against "him or his property in any criminal proceeding, in "a court of the United States. But it had only that "effect. It could not, and would not, prevent the "use of his testimony to search out other testimony "to be used in evidence against him or his property "in a criminal proceeding in such court. It could "not prevent the obtaining and use of witnesses "and evidence which should be attributable directly "to the testimony he might give under compul- "sion, and on which he might be convicted, when "otherwise, and if he had refused to answer, he "could not possibly have been convicted."

In other words, the view of Mr. Justice Blatchford was that, while the evidence which the witness gave could not be produced against him under Section 860 of the United States Revised Statutes, yet that testimony would supply the means of obtaining other evidence for the conviction of the witness. It would, in the first place, establish in the mind of the prosecutor that the witness had committed the offense. It would re-

quire the witness to admit that he had done so, and it would set a prosecution against him in motion, and it would be, as has already been stated, the means of procuring other evidence just as effective to secure his conviction.

Section 860 is not applicable to this case, for another reason. That section expressly provides that the answer of the witness shall not be given in evidence or in any manner used against such party or witness or his property or estate "in any court "of the United States or in any proceeding by or "before any officer of the United States." Evidently, this section was intended to be limited to offenses against the United States. That is to say, a witness under this section, could not be compelled to give testimony which would tend to convict him of an offense against the United States, because the protection of the section is limited to "any court of the United States" or to "any proceeding by or before any officer of the United States."

The offense that Mr. Jones was called upon to disclose to which he was a party, was against the laws of the State of New York, and he did not become entitled to the protection of Section 860 in case a prosecution was instituted against him under the laws of this State.

Section 523 of the Code of Civil Procedure of this State provides that "where a pleading is verified "each subsequent pleading, except a demurrer or "the general answer of an infant by its "guardian *ad litem*, must also be verified. But the "verification may be omitted in a case where it is "not otherwise specially prescribed by law, where "the party pleading would be privileged from "testifying as a witness, concerning an allegation "or denial contained in the pleading."

It has been repeatedly held by the courts of this State that in an action for libel, where the answer denies the publication, the defendant, under this

section, is excused from verifying the answer, on the ground that he would be privileged from testifying as to the publication of the libel.

In Wheeler *v.* Dixon (14 How. Pr. R., 151), which was an action for assault and battery, the complaint was verified and the answer was unverified. A motion was made to set aside the answer. Paige, *J.*, denying the motion, used the following language:

"A witness is not bound to speak when the answer may subject him to a prosecution for a crime, misdemeanor, or to any penalty or forfeiture, or anything in the nature of a penalty or forfeiture, or has a tendency to degrade his character," and then cites the following authorities to support the proposition: 1 Com., 80; 3 Seld., 382; 5 Bar. R., 303; 13 Johns., 82; 4 Wend., 229; 1 Paige, 601; Constitution of 1846, Art. I., Sec. 6; 7 How. Pr. Rep., 37.

In Phœnix *v.* Dupuy (3 Daly, 238), Charles P. Daly, *Ch. J.*, examines this subject in his usually exhaustive manner, and in the course of his opinion says:

"The affidavits on which the orders for the defendant's examination in these two cases before trial, were granted, state that the plaintiff will endeavor upon such examination, to disclose that the letters which constitute the libel for which the actions are brought were published by the defendant; that they were published in malice; that they were received by the parties to whom they were addressed, and that in consequence the plaintiff was injured.

"The letters being libelous, the law would imply that there was malice, and that the plaintiff was injured by their publication; and as no fact is stated in the affidavit showing a tendency to show actual malice or special damage, the discovery sought is reduced to the inquiry whether

" the defendant published the letters, and to whom " he sent them. The discovery which the plaintiff " seeks is to compel the defendant to disclose " whether he has published a libel, or in other words, " whether he has been guilty of a criminal offence " for which he could be indicted and punished.

" In the restriction imposed upon this right of " discovery, nothing was better settled than that " a party could not be compelled to discover any " matter which might subject him to a penalty for- " feiture or a criminal prosecution (Hare on Dis- " covery, Part III., C. 1, Sec. 1; Wigram on Dis- " covery, p. 60, Secs. 83 to 94). ' A plaintiff,' says " Mr. Wigram, ' whatever the merit of his case may " ' be, is not entitled to a discovery from the defend- " ' ant of any matter which would criminate him " ' or tend to do so ' (Wigram on Discovery, p. 195). " Lord Eldon, in Paxton *v.* Douglass (19 Ves., " 226), went even farther, saying: ' The strong " ' inclination of my mind is to protect the party " ' against answering any question, not only that has " ' a direct tendency to criminate him, but that " ' forms one step towards it.' In Baily *v.* Dean (5 " Barb., 303), Judge Pratt was of opinion that a de- " fendant could not be compelled to disclose facts to " enable a plaintiff to sustain an action of slander, " because in such actions punitory damages may be " given; and in Brownsword *v.* Edwards (2 Ves. Sr., " 246), Lord Hardwicke said that the Court would " not force the party, by his own oath, to subject " himself to punishment for usury. And see March " *v.* Davison (9 Paige, 585); Taylor *v.* Bruen (2 " Barb. Ch., 301); In the Matter of Tappan (36 How. " Pr., 394); The People *v.* Mather (4 Wend., 254); In " the Matter of Kip (1 Paige, 607) " (pp. 244–245).

In Goff *v.* Star Printing Co. (21 Abb. N. C. 211), the Supreme Court of this State, in this District, held that " in an action for libel, where the answer " denies the publication, no verification is required; " and as it is evident from the complaint in this

" action that the defendant or its officers would be " privileged from testifying, an unverified answer, " without any affidavit, is good " (p. 214).

In Kinney *v.* Roberts (26 Hun, 166), which was an action for libel, the Supreme Court in this State, in the Fourth Department, Smith, *J.*, delivering the opinion, held that " it was a fundamental rule " of the Court of Chancery that it would not compel " a defendant to discover that which, if he answered " in the affirmative, would subject him to punish- " ment, or render him infamous, or expose him " to a penalty (McIntyre *v.* Mancius, 16 Johns., " 592). For that reason the Court would not " compel a defendant in an action for libel or " slander to furnish evidence in answer to a bill " for discovery, to maintain the action and subject " himself to punitive damages, they being in the " nature of a penalty (Baily *v.* Dean, 5 Barb., 297; " March *v.* Davison, 9 Paige, 580)" (p. 169).

The plaintiff offered no other evidence of the publication of the libel, except the testimony of Mr. Griffin, that he bought the papers that were offered in evidence at the office of the New York *Times* at the junction of Park Row and Nassau street, in this city (fols. 101 and 102). That evidence would prove nothing, without the testimony of Mr. Jones, that the business of the association was the publication of the paper The New York *Times*, and that it carried on its business in the building at the junction of Park Row and Nassau street.

II.

The learned Appellate Court erred in holding that the Circuit Judge did not err in allowing the plaintiff to amend the complaint by inserting the words "the said joint stock association "known as and for the New York Times," &c.

The effect of this amendment was to change the party defendant to the action. As the complaint originally stood, it was an action against Henry A. Morgan, individually, and the allegations were directed against him individually, and it would have been necessary, under that condition of pleading, to prove the publication of the articles by *him*. By the amendment, he was personally eliminated from the action, and the New York *Times* Association was substituted for him; in other words, he was sued as representing the New York *Times* Association.

As has already been stated, an unincorporated joint stock association, under the laws of this State, is a mere partnership. Under Section 1919 of the Code of Civil Procedure, where an association consists of seven or more associates, the association may be sued in the name of its president, or all the members may be sued in the action. The plaintiff in this action elected to sue in the name of the president. Mr. Morgan, therefore, became the defendant in the action. The association is not the defendant. While Mr. Morgan was the defendant, he was so only in a representative capacity, and the allegations of the complaint should have been directed against the association.

In the case of Bacon *v.* Densmore (42 How. Pr. R., 368), a motion was made to change the place of trial. The plaintiff was a non-resident and the defendant was sued as the president of an unincorporated joint stock association. The Court held that

the person named as the defendant was the party to the action. Gilbert, *J.*, in the opinion delivered by him, says:

"The defendant has a legal right to have the "place of trial changed to New York, if the persons "named as plaintiff or defendant are the parties to "the action. The Court has no discretion about "it.

"We think they are parties. The associations "which they represent clearly are not, nor could "they be made parties, inasmuch as they have no "legal capacity to sue or to be sued. Such asso- "ciations are not corporations, but are mere part- "nerships. But for the statute authorizing suits "to be brought by and against them in the name "of officers thereof, all the partners would have to "be joined as plaintiffs and defendants. Suits may "still be brought by such associations, although, "when sued, it must in the first instance be in the "name of the president or treasurer. The partners "are not parties, because they are not named on "the record.

"It is not even known how many or who they "are. The parties named are, therefore, the par- "ties in a legal sense. It is true, the suit is car- "ried on for others who are beneficially interested "with the nominal parties, but that is the case "when the action is brought by the trustee of an "express trust by an agent contracting in his own "name, without disclosing his principals, or when "the contract is made for an unknown principal by "executors and administrators and like cases. And "yet, it is clear, that such beneficiaries are not par- "ties to such actions. The Superior Court of New "York took a similar view of the subject in a case "arising under Section 390 of the Code, authorizing "the examination of a party."

In the case of Ogdensburg Bank *v.* Van Rensselaer, President, &c. (6 Hill, 240), the allegations of the complaint were substantially the same as they are in

this case. On an application to the Court involving the discussion of the nature of the action, Bronson, *J.*, delivering the opinion of the Court, said: "This "is an action against Van Rensselaer, and the words "which follow his name—president of the St. Law- "rence Bank—can only be regarded as a *descriptio* "*personæ*. The question was decided in Delafield "*v.* Kinney (24 Wend., 345) It was also decided at "the last term, on the argument of a cause where "the declaration was framed in the same way "against an executor. And it is decided by all the "precedents in the books where one is sued in *autre* "*droit*. If the plaintiffs wished to recover a debt "due from the St. Lawrence Bank, the declaration "begins well enough by naming Van Rensselaer, "and describing him as president. But the pleader "should then have proceeded to allege that the St. "Lawrence Bank was indebted, and, being indebted, "promised to pay. And the breach should be, that "the bank had not paid. And when one of these "corporations sues in the name of its president, the "pleader should allege that the defendant was in- "debted to the *bank*, not to the plaintiff.

"It is said that the plaintiffs evidently intended "to sue the St. Lawrence Bank. I do not doubt "that the fact is so. But we are not interpreting "a contract, and searching out the meaning of the "parties from doubtful and equivocal words. This "is a question of pleading, and if we had an affi- "davit that the pleader meant the bank, and not "Van Rensselaer, it would still be a declaration "against the individual and not against the bank" p. 241).

In Delafield *v.* Kinney, President of Erie County Bank (24 Wend., 345), it was held that a suit against an association formed under the general banking law may be brought against *it* either in the name of the association or in that name with the addition of the name of the president thereof; but the contract must be stated as having been made by or with the bank

using the name by which it acquires rights of action and contracts liability, or the declaration will be bad. Bronson, *J.*, in the course of his opinion, uses the following language:

"I was at first inclined to think the Court might "be supported on the ground already suggested, "that each of these associations has two corporate "names, by either of which it may sue or be sued. "This company is sued by one of its names, to wit: "'George N. Kinney, President of the Erie County "Bank;' and then the word 'defendant,' as used in "the count, refers to, and means the corporation— "not the individual. But the difficulty with this "view of the case is, that the name by which the "company is sued is not the name by which it is "authorized to deal, and the plaintiff, consequently, "fails to show that the bank made a valid contract.

"The pleader should have alleged that 'the Erie "'County Bank,' made the note, had notice, became "liable, and promised to pay. That part of the count "which states that the defendant became liable, and "in consideration thereof promised, &c., might, per- "haps, be rejected as surplusage. But the difficulty "will still remain, for in stating the express contract, "the pleader alleges, that the defendant—meaning, "as has already been seen, either that George N. "Kinney personally, or the bank by a name in "which it is not authorized to contract, declared "and certified" (pp. 348–349).

As has already been urged, the amendment of the complaint permitting the interpolation of the words "said joint stock association known as and for the "*New York Times*," &c., was specifying an entirely new party in the action, and, consequently, bringing in a party without a summons and without affording that party an opportunity to answer the complaint. In other words, it assumed that the joint stock association was in court, in some way or other, and compelled it to stand upon the answer of Henry A. Morgan individually.

It is respectfully submitted that the rulings of the Circuit Judge and their affirmance by the Circuit Court of Appeals are, by analogy at least, contrary to the holdings of this Court and the law of the land, and that it is a question of the gravest importance whether a trial Judge may compel a witness against his will and the protest of his counsel to give testimony which might subject him to punishment in a criminal action.

JOHN C. PENNIE,
Of Counsel for the Petitioner.

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Office Supreme Court U. S.
FILED.
APR 30 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

HENRY A. MORGAN, as President of *The New York Times*,
Petitioner and Plaintiff in Error,

AGAINST

SIGISMUNDO E. HALBERSTADT,
Defendant in Error.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The answer of Sigismundo E. Halberstadt, the defendant in error herein, to the petition of Henry A. Morgan, the plaintiff in error herein, respectfully shows:

That, for greater particularity as to the cause of action set forth in the complaint herein, and as to the defense and defenses set forth in the answer herein, he refers to the certified copy of the transcript of the record in the United States Circuit Court of Appeals for the Second Circuit, referred to in the petitioner's notice of motion, received this 25th day of April, 1894.

4 That respondent refers to the said transcript of record as proof that no constitutional question was involved on the appeal herein, and denies that any novel question of law was raised on the said appeal.

That he avers that the verdict rendered against *The New York Times* herein was richly deserved by the said *The New York Times*, its attacks upon your respondent being false, untrue and malicious in every respect and particular, and the defense interposed to the complaint herein, namely that of justification, having failed, both at large and in detail, and this case having gone to the jury as of necessity, without a particle of proof in substantia-
5 tion of the alleged defenses of *The New York Times*, and practically on the sole question of damages.

That one of the many libellous charges made against this respondent by the petitioner herein, and the only one which was attempted to be defended on the trial of this action, was, that this respondent, while acting in various capacities in South America for the New York Life Insurance Company, became short in his accounts, by that charge implying embezzlement.

That this charge in every detail and particular was false and malicious, and that, in justification of the same, the said *The New York Times* relied wholly and exclusively on the various contracts
6 made and entered into between this respondent and the New York Life Insurance Company. That in and by the perusal of the said contracts, it will appear that at no time was this respondent short in his accounts with the said New York Life Insurance Company. That the relations which existed between him and the said Insurance Company partook in many respects of a partnership. That is to say, that this respondent was, in and by the terms of his contract with the said Insurance Company, fully authorized and empowered to take out of the moneys coming into his hands as such agent, funds necessary to advance and promote the interests of the com-

pany in the various departments in which he served it. That such expenditures made by him in the promotion of the company's business, over and above his salary and commissions, were charged against him as a debt, which debt, in and by the terms of his said contract with the said insurance company, was to be paid from and out of renewal premiums accruing on the various polices of insurance issued, or caused to be issued by him, and which renewal premiums, as will appear from the record in this case, will not expire until about the year 1898 or 1899, and which renewal premiums, as will appear from the said record, will be more than sufficient to repay all the expenses incurred by this respondent in so promoting the business of the said insurance company, and will, in addition leave a large and considerable profit for him, this respondent. 7 8

That all of the expenses so incurred by this respondent in so promoting the business of said insurance company were, without exception, reported month by month during this respondent's connection with said insurance company, which extended over a period of some eight years. That not a month elapsed during that period during which this respondent did not report each and every item of moneys used and advanced by him.

That upon the appeal to the United States Circuit Court of Appeals for the Second Circuit herein, this respondent submitted and filed a brief, a true copy of which is hereto annexed and hereby made part hereof. 9

WHEREFORE, respondent prays that the petition herein may be in all things denied, and that he have such other and further relief herein as may be just.

And your petitioner will ever pray.

Dated New York, April 27, 1894.

SIGISMUNDO E. HALBERSTADT,
By ROBERT H. GRIFFIN,
His Attorney.

10 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

Personally appeared Robert H. Griffin, who being duly sworn, on his oath says: That he is the attorney and of counsel for Sigismundo E. Halberstadt, the respondent and defendant in error herein, and, as such, had personal charge for him of the case in the petition herein mentioned in the Circuit Court of the United States for the Southern District of New York, and in the United States Circuit Court of Appeals for the Second Circuit, and that he has read the foregoing answer by him subscribed, and that the facts therein stated are true.

ROBERT H. GRIFFIN.

11 Sworn to before me and subscribed in my presence this 27th day of April, 1894.

GUSTAVE MEIDT,
Notary Public (117),
N. Y. Co.

Evening Post Job Printing House—N. Y

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

HENRY A. MORGAN, as President, &c.,
Plaintiff in Error,

vs.

SIGISMUNDO E. HALBERSTADT,
Defendant in Error.

Brief for Defendant in Error.

From November 12, 1884 (fol. 242), until on and after the last of the four libels in the complaint set forth, the defendant in error was continuously employed in various capacities in South America by the New York Life Insurance Company.

September 5, 1891, the plaintiff in error *The New York Times*, published, amongst other things, of Halberstadt as agent of that company, that he was short in his accounts $28,000. That "while standing in the barroom of the Hoffman House * * * he boasted of the manner in which he was helping himself to the company's funds" (fols. 17, 20, 341). So on

September 30, 1891, it published, amongst other things, that he was an "intemperate German," that he was "short in his accounts $12,000 in Chili;"

" that for this he was not only not punished, but " transferred to another agency " (fols. 22, 23, 345). Again on

October 10, 1891, it published, amongst other things, that he had a " notoriously bad character;" that he had " unlimited opportunities to swindle " and deceive the policy holders, and availed himself " of those opportunities " (fols. 24, 25, 26, 347). And finally on

November 1, 1891, it published, amongst other things, that he had " made use of all sorts of exag- " gerations and deceits in Spanish-America;" that " attention must be drawn to him if the Company's " affairs in Spanish-America were to be thoroughly " exposed," that he was a " defaulter," that he had " stolen the Company's money " (fols. 28–33, 350–353).

The *Times* answered, pretending to justify each charge. It said:

(1.) That he had " wrongfully kept and retained " to his own use "

In Peru and Bolivia (fols. 40, 41)	$6,568 42
In Chili (fol. 42)	5,792 28
In Mexico (fol. 43)	13,687 06

(2.) That on March 6, 1891, at the Hoffman House bar, he stated that he had helped himself to the company's funds (fol. 44).

(3.) That for all this he " was not punished," but in " June, 1889, was made general agent of the company in Mexico " (fol. 50).

(4.) That he made fraudulent statements to policy-holders (fol. 54).

As a further defense it alleged that " his character was bad " (fol. 65).

On the trial these defenses were all abandoned, except that which charged him with being an embezzler. That charge was based solely on the con-

tract of June 20, 1890, between Halberstadt and the company, and the statement of accounts between them therein contained—whereby it appeared that at that time Halberstadt "owed" the company (fol. 323) as follows:

"To the sub-department of Chili:

a/c 1882–1886	$2,396 22	American	gold.
a/c 1886–1887	4,172 20	"	"
a/c 1888–1889	5,792 29	"	"
	$12,360 71	"	"

To the sub-department of Mexico:

Up to April 30, 1890, $5,209.25 Mexican silver (fol. 324).

This indebtedness was strictly legitimate, and was in every particular authorized by the terms of his contracts with the company.

The Peruvian-Bolivian Account, Nov. 12, 1884, to Dec. 1, 1887.

He first went into the insurance business November 12, 1884, in Peru as a soliciting agent of the company, and remained in that country until December 1, 1887, when he was called to Chili (fol. 242). This account is called that of "1882–1886 and 1886–1887" (fol. 323), although his connection with the company did not begin until November, 1884 (fols. 214, 215, 242, 249), and the indebtedness really "arose between 1884–1886 and 1886–1887" (fol. 250). During this period he acted as a soliciting agent for the company (fols. 14, 99–101). By the terms of his employment he "received only 20 per cent. commission and had "to pay his traveling expenses himself. These ex- "penses in opening up a country like Bolivia were "very high. He had to travel with six mules, and "had to have a guide and a servant. His expenses "exceeded his earnings, and he either drew "on the company for them or received the

"money by letter of credit" (fols. 209, 210) or received it directly from bankers who had "standing orders from his superior officer, Mr. "Fesser, that when he needed money they should "pay him. Whereupon he would give a receipt for "the money received, and the bankers would "charge it to Mr. Fesser" (fol. 251). And the entire indebtedness, $2,396.22 and $4,172.20 for this period arose in this way, "traveling expenses in excess of "commissions earned" (fols. 249, 251). He never handled or drew on any of the premiums collected. "When a man insured, Halberstadt made out a "receipt and endorsed it to the company's collecting "agent. The agent collected the money, and then "noted on a stub the amount he had received. "That stub Halberstadt sent into the office with "the application to prove that the money had been "deposited with the banker. Then the application "was forwarded to the company, and if the com- "pany took the risk it was sent back to the Chili "office, or to the head office, and they delivered the "policy. The head office sent it to the collecting "agent to deliver the policy, and when he collected "the money Halberstadt sent the stub to the com- "pany. The company, as a matter of fact, knew "constantly how much money was received and "how much money he expended every month, and "sometimes twice or three times a month. *No part "of the money was deposited in his name. He did "not have control of the premium money after it "was paid*" (fols. 210-212).

The Chilian Account, Dec. 1, 1887, to June, 1889.

In 1887 the company's agent in South America was replaced by Mr. Sanchez, "who called Halber- "stadt from Bolivia, when he entered into a con- "tract with Fesser and Viollier to manage the "Chilian and Bolivian business" (fol. 242), by the terms of which Sanchez, as manager of the Spanish-American Department of the company, allowed

them 41¼ per cent. on all premiums, and to Halberstadt 5 per cent. in addition on all renewals for six years (fol. 215), those renewals not ending until 1895 (fol. 216). Under this contract Halberstadt was stationed at Iquique, his partners Fesser and Viollier at Santiago (fol. 244), four days away by steamer (fol. 212). He had no knowledge of what was going on there (fol. 248). He remained there till the end of 1888 (fol. 244), then Wallerstein, the company's auditor, sent for him, saying "he had better come down" (fol. 212), and when he went to Santiago and took charge of the office there (fol. 244), and when he discovered that his partner Viollier "had mis-"managed the business entirely" (fol. 206) "by ex-"pending money in horses and carriages, in making "too big advances to agents over and above their "earnings, in giving high style lunches, &c., &c." (fol. 248), by reason of which on an examination of Fesser's books by Wallerstein, the company's auditor (fols. 170, 212), and his report thereon, which he and Halberstadt signed (fol. 212), there appeared a loss of $5,792.29 — one of the amounts which the *Times* claimed Halberstadt had embezzled, and the only loss incurred by him during this period—during which same period the company complimented him on the large increase of business he had secured, and eulogized his energy and ability—writing him, amongst other things, the following on June 26, 1888: "We "congratulate you sincerely on the quantity of in-"surance you have obtained, and we trust that "you will go on in the same way, which will per-"sonally give splendid results to you" (fol. 223). And again on July, 16, 1888: "We congratulate "you on the result of your business. In the four "months it amounts to $1,200,000 alone in Tacna, "Pisaqua and Antifagosta. That you continue so "is our best wishes, because in that you will find "due remuneration for your good work" (fol. 223). And still again on December 27, 1888: * * * "The year which has now gone to an end has been

" very prosperous, and the management of our " business in your sub-department very satisfactory, " and you must be very proud of the good results " which have been obtained by your good manage- " ment and intelligence * * *" (fol. 224).

The Mexican account September 1, 1889, to September 1, 1892.

In 1889 Halberstadt sent in his resignation as assistant manager in Chili, and the company telegraphed him to go to Mexico; the business there having gone to rack and ruin, and he being sent to work it up, in which object he succeeded, in one year increasing it from $100,000 to a million and a half (fols. 212, 213).

His duties, rights and liabilities in that employment are stated with great particularity in the contract he then entered into, September 2, 1889, and which will be found at pages 97 to 106. The contract is important also, as a description of the company's methods of business from 1884 to 1892, and as a complete vindication of Halberstadt. The more important provisions are the following:

Clerks were all appointed by the company (fol. 250).

Signatures had to be joint. The manager (Halberstadt) signed nothing alone (fol. 291).

Advances to the amount of $10,000 in silver might be made to agents, but were " to be a lien " against all commissions or other compensation ac- " cruing to Halberstadt" (fol. 295). "Such ad- "vances to be considered by him as a personal debt " to the company." *Their reimbursement; however, " not to be demanded until he earned sufficient to pay " it back*" (fol. 296).

Profit and loss account was to be stated each year between the company and him (fol. 297). If it showed less than $6,000 Mexican silver in his favor the company was to make good the difference (fol. 306).

Salary, $340 American gold, a month, to pay employees, rent, traveling expenses, &c. Should that amount not suffice, he was to make good the difference (fol. 297).

Commissions—out of which he was to pay his subagents the commissions agreed upon between them —ranging from 5 to 45 per cent. (fols. 299-302) on the first year's premiums on all insurance effected (fol. 302).

Renewals on the first six years of each policy written by him, 5 per cent. (fol. 303)

Traveling expenses incurred by him to be entered in the traveling expense account and at the end of the year to be charged against him (fol. 308.)

Accounts to be sent monthly to the company as well as press copies of the ledger and cash book, and duplicates of all contracts with agents (fol. 314).

Indebtedness incurred in Chilian Department "to be paid back out of renewal commissions, and out of his remaining interest in that department" (fol. 316).

This contract was subsequently modified in his favor owing to

The Furniture Account.

When in December, 1887, he went to Iquique, in Chili, he applied for an advance to furnish a house there, $2,000 of which in silver was allowed him June 8, 1888, he borrowing $2,000 more from a bank. When in 1889 he was called to Santiago, he had to sell it at a heavy loss, as he reported to Sanchez at Paris when the contract of September 2, 1889, was entered into, and when he said to him, "Will you allow me to furnish a house on my arrival in Mexico?" to which reply was given, "Yes." He then went with an inspector of the company and bought it and charged it up on the company's books. In June, 1890, objection was made to this, and the difference was adjusted by charging him personally

with it and by amending the existing contract (fols. 204–207), on June 20, 1890 (fol. 332), as follows:

(1.) His guaranteed profit was increased from $6,000 silver to $6,000 gold (fol. 322).

(2.) His authorized advances to agents was increased from $10,000 silver to $10,000 gold (fol. 326).

At the same time and in this modified contract a stated account was had—as provided for in the original contract (fol. 316)—of his indebtedness to the company on the profit and loss account of the Chilian Department (fol. 324).

In 1891 the *Times* commenced its attack on the New York Life, and the defendant's witness Van Antwerp wrote one article a day for eight months on this subject (fol. 264) and "about two months " after he quit was employed in the office of the " secretary of the company " (fol. 265). Before then, however, and on December 3, 1891, this action was commenced (fol. 235); but the differences between the *Times* and the company having been subsequently adjusted, and all the higher officials retained in office, except the president, who was pensioned on a very liberal salary (fols. 269–272), the company on May 18, 1892, cabled Halberstadt: "All " suits against *N. Y. Times* by order Board of Trus- " tees have been discontinued. I wish that you will " act at once in similar way in your case, so com- " pany will not suffer from agitation of old matters. " Please instruct Col. Ingersoll by wire of your " desire " (fol. 390). To which he on May 19th re- " plied by cable: " My reputation has been damaged " greatly by *New York Times'* repeated publications. " Impossible settle this matter by wire. If com- " pany pay expenses will leave here for New York " and try to arrange matter" (fols. 391–393). Which assertion of his rights produced on May 28,

1892, this communication from the company: "Your favor of the 19th inst. was duly received. " * * * In reply * * * to your tele- "gram of the 19th inst. we telegraphed "you as follows: 'We cannot comply with " your suggestion. We have nothing further to say " at present. * * .* As our first telegram to you " was solely in what seemed to us to be the general " interest of the company, and as you do not find that " you can meet our views therein expressed, except " upon conditions entirely beyond our control, there " remains nothing further to be said and nothing " further to be done, except to let the whole matter " drop on the part of the company" (fols. 373-376).

Halberstadt's connection with the company having to terminate August 31, 1892, and he having refused to stultify and dishonor himself "in what seemed to be the general interest of the company," and persisting in such refusal, that victim of the *Times*, presumably under some obligation of indemnity to it, deliberately proceeded to attempt to manufacture a case against its trusted employee.

Through their representative, Castroverde (fol. 238), criminal proceedings were instituted against him in Mexico towards the end of October (fol. 239), for embezzling money of the company (fol. 240), as he learned while on his way to Durango (fol. 239); and as the law of Mexico is that whether innocent or guilty you can be kept in prison seventy two hours before a judicial inquiry is instituted, and that then a decision need not be rendered for six months, he consulted Col. Ingersoll, who said, "Come right to New York" (fol. 239). As soon as he arrived here he confronted the officers of "The New York Life." He went to call on Mr. McCall, the president, who refused to see him. He came here to see what they had against him and to meet any charges. He preferred to meet the charges here (fol. 255) "in a civilized country" (fol. 240). From that time to this they have not dared to prefer any charge against him.

Still impelled by their obligation of indemnity to the *Times*, the company on the trial furnished it with a witness by name of Julius Wallerstein, to justify the libels and to prove his criminality. His contribution to the conspiracy will be found at pages 36 to 64. Without going into the details of his manufactured charges, and their refutation, it appeared by him amongst other things:

That he had been auditor and inspector of accounts of the company. That he was then attorney in fact of Sanchez, the manager of the company's Spanish American Department (fol. 117). That in December, 1887, he first met Halberstadt, and was at that time in the company's employ (fols. 115, 145). That "there was nothing which would allow him to say "that there was anything in Halberstadt's accounts "at the time he examined them which raised in his "mind the suspicion that Halberstadt was dishon-"est" (fol. 148). That in examining the accounts "he did not find any month that Halberstadt did not "account. That there was no charge that he did "not report every month" (fol. 158). He "did not "know of any expenditure by him which he, Hal-"berstadt, did not report" (fols. 161, 162). He "did not know of a solitary report sent by Halber-"stadt which was not honest—in which there was "one item which was not true" (fol. 162). "He "never pretended to have advanced money to agents "who were not agents" (fol. 181).

The defendant pleaded a justification as to each and every charge against the plaintiff, and failed in every detail and particular in substantiating any one of them even in the slightest degree.

The matters treated of by it were of interest to hundreds of thousands of the company's policy holders throughout the civilized world, and its attacks on the plaintiff reached and were read in every

quarter of the globe. He was driven from the country where all his business interests were located; and was under universal suspicion as a thief, till the jury vindicated him by a verdict of $15,000.

POINTS.

I.—There was no error in overruling defendant's objections to the questions propounded by plaintiff to its treasurer (fols. 82, 88).

The admission of this evidence worked no injury to defendant, for irrespective of it there was sufficient evidence of publication of the libel by defendant. It already appeared—

(1.) That there existed a joint stock association called "*The New York Times*" (fol. 76).

(2.) That it consisted of seven associates (fol. 76).

(3.) That its place of business was the City of New York (fol. 76).

(4.) That Henry A. Morgan was the president (fol. 77).

(5.) That there existed in New York City a daily newspaper known as and called *The New York Times* (fols. 88-95, and Exhibits B, C, D, E).

(6.) That the papers came from the office of *The New York Times*, in the City of New York (fol. 102).

This was sufficient. In a similar case against the same defendant, Judge Pryor, at General Term of the Common Pleas, said:

> "The issue of the paper containing the ar-
> "ticle and its production in Court constitute

"complete proof of publication, and by identity "of name, control and locality of office a *prima* "*facie* connection of the company with the "newspaper and publication by the company "were so shown as to require contradictory evi- "dence from the defendant."

Witcher *vs.* Jones, 17 N. Y. Supl't, 491.

Irrespective of this the evidence was admissible, the statute relating to joint stock associations providing as follows:

"No officer or member of any joint stock as- "sociation shall be privileged from testifying "in any suit, action or proceeding against said "association * * * in respect to the exis- "tence of said association * * * or of any "facts relating to the organization thereof."

New York Laws 1885, Chap. 505, § 5.

Section 1 of the same laws requires such associations to file an annual certificate stating amongst other things its principal place of business—which in the certificate filed in the case at bar was given as "New York City" (fol. 76) so that there was no error in particularizing the locality by taking Mr. Jones' answer that the defendant's place of business was in "New York City; at Park row and Spruce street, "in the building known as 'The Times Building'" (fol. 85.)

In fact, the above quoted statute seems to have been passed in view of just such cases as this. The officers "shall not be privileged from testifying * * * as to any facts relating to the organization of the association." The place of business and the nature of that business—the objects of the association—are surely "facts relating to the organization," and there was no error in taking the witnesses' evidence that the defendant "was engaged in business in publishing a newspaper called *The New York*

Times (fols. 82–85), and had not discontinued said publication at any time since he had known it."

If there is any force in this exception it must be under § 837 of the Code of Civil Procedure, but which for some reason plaintiff in error does not cite. That section, paraphrased, reads:

> "A witness shall not be required to give an "answer which will tend to accuse himself of "a crime or misdemeanor."

The contention is that the witness was entitled to this privilege, because "every member of a joint "stock association is liable *criminally* for the pub- "lication of a libel by the association."

Unless it can maintain this position, the exception fails. In support of it not an authority is cited, nor does defendant in error know of any.

Aside from this, the privilege is personal to the witness, and his waiver of it is of no avail to the plaintiff in error.

> "No man shall be compelled to criminate "himself; but if, from a sense of justice or any "other consideration, he is willing to make dis- "closures which involve his own character, and "may expose him to punishment, I know of no "reason either of law or policy which would "prevent him."
>
> Southard *vs.* Rexford, 6 Cowen, 255, 260.

> "The privilege belongs exclusively to the "witness, who may take advantage of it or not "at his pleasure. The party to the suit cannot "object. He has no right to insist upon the "privilege and require the Court to exclude the

"evidence on that ground. The witness may "waive it and testify in spite of any objection "coming from the party or his counsel. * * * "If ordered to testify in a case where he is priv- "ileged, it is a matter exclusively between the "Court and the witness. * * * The party "has no right to interfere or complain of the "error."

Cloyes *vs.* Thayer, 3 Hill, 564, 566.

In the case at bar the witness neither individually nor as an officer of *The Times* asserted or claimed the privilege. All that was done or attempted to be done in the matter was by counsel (fols. 82-87).

II.—There was no error in allowing plaintiff to amend the complaint by inserting after the word "Defendant" the words, "The said Joint Stock Association known as and called The New York Times" (fols. 80, 81).

The form of this action is govered by Section 1919 of the New York Code of Civil Procedure, which reads:

"An action * * * may be sustained by "the president or treasurer of an unincorporated "association consisting of seven or more per- "sons * * * upon any cause of action for "or upon which all the associates may "maintain such an action. * * * *An "action * * * may be maintained against the "president or treasurer of such an association "* * * for any cause of action, for or upon "which the plaintiff may maintain such an ac- "tion * * * against all the associates "* * *"

The amendment complained of did not substitute one party for the other, and was justified by Section 1921 of the same Code, which reads:

> "In such an action * * * a judgment
> "against the officer against whom it is brought
> "does not authorize an execution to be issued
> "against his property, or his person; nor does
> "the docketing thereof bind his real property
> "or chattels real. Where such a judgment is
> "for a sum of money, an execution issued
> "thereupon must require the Sheriff to satisfy
> "the same out of any personal property belong-
> "ing to the association. * * *"

In 1878 the New York Court of Appeals rendered an opinion which seems conclusive on the correctness of the ruling of the learned trial Judge on this point.

In that case the question was as to the effect of a judgment running against "William P. Ostrander, President of The Old Saratoga Union Mercantile Association," the appellant contending that it bound the president only, and as an individual, and the respondent that it bound the association only, and in no wise the president as an individual. The respondent's contention was unanimously endorsed, the Court saying:

> The complant "alleges that the *defendant*,
> "The Old Saratoga Union Mercantile Associa-
> "tion, was a joint stock association, &c., of
> "which Ostrander was president; that as such
> "president he made the note * * * that
> "when the note became due it was presented to
> "the *defendant*, and that the *defendant* was
> "justly indebted to the plaintiff thereupon.
> "*This sufficiently alleged that the note set out*
> "*was the note of the Association, and that*
> "*the debt thereby created was owing from the*

> "*Association and not from Ostrander personally* * * * ."
>
> Natl. Bank *vs.* Van Derwerker, 74 N. Y., 234, 238.
> Affirming, 1, T. & C., 313.

The action of the Court rested, under the circumstances, entirely in its discretion and was sanctioned by statute:

> "The Court may, upon the trial * * * "in furtherance of justice * * * amend "any process, pleading or other proceeding "by * * * *correcting a mistake in the name of "a party* * * * And in every stage of the "action the Court must disregard an error or "defect in the pleadings or other proceedings "which does not affect the substantial rights of "the above party."
>
> N. Y. Code Civil Procedure, Section 723.

Exercising this discretion, Judge Bartlett, in 1888, in the Second Department of the New York Supreme Court, where an unincorporated association was sued by the name of "The Democratic General Committee of Kings County," allowed the plaintiff to amend the summons so as to make the title of the action read "McKane *vs. John P. Adams, as President* of the Democratic General Committee of Kings County," saying, amongst other things, after reviewing the decisions:

> "In allowing an amendment, therefore, "which shall bring the name of Mr. Adams "into the title of this action, *the Court does not "strike out the name of the real defendant, but "merely permits a formal correction of the "designation which has been employed, so as to "conform to the requirements of the statute.*"
>
> McKane *vs.* Democratic, &c., Committee, 21 Abb. N. C., 89, 92,

and this decision was never questioned by the defendant.

McKane *vs.* Adams, 51 Hun, 629–630.

In the same year the General Term of the First Department of the same Court allowed the plaintiff who had brought an action against a corporation, "The World Publishing Company," to amend the summons by changing the name of the defendant to "The Press Publishing Company."

Reilly *vs.* World Publ'g. Co., 14 N. Y. St. R., 390.

The cases cited by plaintiff in error in support of his exception in this behalf were decided—Delafield *vs.* Bank (24 Wend., 345) in 1840, and Bank *vs.* Van Rennselaer (6 Hill, 240), in 1843, that is to say, before Laws 1849, Chap. 258, § 1 (Code, § 1919), was passed, and are so cited in face of the fact that the Court of Appeals in National Bank *v.* Vandewater (74 N. Y., 238), *supra*, elaborately distinguished and refused to follow them, and are so cited together with Bacon *vs.* Dinsmore (42 How. Pr., 368), decided in 1872, although subsequent thereto "The regulations of Laws 1849, Chap. 258, §§ 1 and "3, were revised in 1880 in Code Civil Procedure, "§ 1921."

20 Abb. N. C., 152, note.

III.—There was no error in admitting in evidence the newspapers headed *The New York Times*, and containing the articles complained of (fols. 89–95).

See argument in Point I. above.

IV.—There was no error in the charge of the learned trial Judge nor in his refusals to charge (fols. 281-287).

The charge itself is a refutation of the criticism of the plaintiff in error, and is so clear and simple that authorities are not needed to demonstrate its correctness. The requests made by plaintiff in error were all in contradiction of the facts, and involve no questions of law.

The plaintiff fared better than a strict application of the law entitled it to. The Court would have been justified in charging that the only question before the jury was as to the amount of damages. There was a total failure of proof in justification, and this in effect left but one question of fact for determination—the extent of the injury inflicted.

The "precise charge," "the whole of it" and "the very words alleged to have been uttered" must be justified.

> Odgers on Libel and Slander (Blackstone Publ. Co.'s Ed.), pp. 130, 135, 412, 413, 444.

> "The justification must always be as broad "as the charge, and of the very charge at- "tempted to be justified."
>
> Townshend on Libel and Slander (Edit. 1890), p. 311.

> "The plea of justification must be direct and "explicit. It must in every respect correspond "with, and be as extensive as, the charge in the "declaration. It must be as broad as that charge "is; if it go beside it or fall short of it, it is "naught it must be, in point of law, identical "with it. * * * The justification must jus- "tify the precise charge."
>
> Newell on Defamation, Slander and Libel, p. 796.

The matter pleaded in justification should be pleaded "substantially as in an indictment."

McKane *vs.* Brooklyn Citizen, 53 Hun, 132.

Andrews *vs.* Van Duzer, 11 Johns., 38.

"An answer must be as broad as the charge "which it seeks to justify."

Hathorn *vs.* Congress Spring Co., 44 Hun, 608, 610.

Skinner *vs.* Powers, 1 Wend., 451.

Where the charge was that plaintiff *used* foul and polluted water in malting grain for his brewery, and defendant attempted to justify, it was said, by Nelson, *C. J.:*

"A plea should be direct and positive, and not "by way of rehearsal or argument (1 Chitty, "518; 8 Cowen, 728, 729; 15 Wendell, 656). "* * * Again, the plea states that water "was carried to the malthouse of plaintiff of "great thickness, to wit, as thick as cream with "filth. This is but a literal justification of the "charge; carrying filthy water to the malthouse "contained no imputation upon the plaintiff or "his establishment, except by inference or argu-"ment. The pleas do not meet the sting of the "libel, namely, that water of this description "was used by the plaintiff in the business of "malting. This is the charge intended by the "writer. * * * It should, therefore, have "been directly met, and not by way of re-"hearsal and argument."

Fidler *vs.* Delevan, 20 Wend., 57, 60.

To same effect:

Snow *vs.* Witcher, 9 Ired., 346.

The answer, and all of it, offends the settled rule that to justify a libel charging a specific offense you shall

not be permitted to state some other, though stated as of the same character.

On this point it was said by Cowen, *J.*:

> "The proposition, for instance, to establish "hardness of the plaintiff toward the poor, dissoluteness in his morals, immorality in his "principles, and habits of vice and calumny by "instances of conduct not detailed or alluded to "in the book were inadmissible, for the reason "that all these were imputed as conclusions deducible from particular instances enumerated "and arranged in the book with a view to the "establishment of those conclusions. Most "clearly, the defendants below had no right to "depart in their proof from the circumstances "they had set forth. They say, for instance, "Verren wrote and sent anonymous letters of a "certain character; therefore he was guilty of "calumny and obscenity. To allow proof of "other instances, such as defamatory and obscene conversations, would be to violate the "well-settled rule that to justify a slander, "charging a specific offense, you shall not be "permitted to prove another, though of the "same character."
>
> Barthelemy *vs.* The People, 2 Hill, 248, 256.

To the same effect are—

Andrews *vs.* Van Duzer, 11 Johns., 38.
Stiles *vs.* Comstock, 9 How. Pr., 48.

In the third place, a plea of justification merely tending to establish the truth of the libel is bad.

Thrall *vs.* Smiley, 9 Calif., 529.

In the next place, the justification conspicuously offends the rule, that if a material part of a plea of justification fails, the plea fails altogether.

Townshend on Libel and Slander, § 359 and notes.

"There is no such thing as a half-way justifi-
" cation. When several things are charged
" (where the libel is divisible), the defendant
" may justify as to one, though he may not be
" able to do so to all; but, as to any one charge,
" the justification will be everything or noth-
" ing."

Fero *vs.* Ruscoe, 4 N. Y., 165.
Sawyer *vs.* Bennett, 28 Abb. N. C., 393.

In the fifth place the justification is bad for failing to observe the rule that the facts which show the charge to be true must be stated with certainty.

Where the libel stated that the plaintiff, as manager of the opera, employed his critics to attack, in corrupt and purchased newspapers, the women of his company, it was held that the justification of such a charge must state the names of the critics, of the women, and of the corrupt newspapers, and the substance of the articles, and the times and places of their publication.

Fry *vs.* Bennett, 5 Sandf., 54.

To same effect:

Wachter *vs.* Quenzer, 29 N. Y., 552.

In the last place:

"Where the charge is a conclusion or infer-
" ence from certain facts there the plea must
" set up the facts which warrant such an in-
" ference."

Townsend on Libel, § 355, top page 594.
Herr *vs.* Bamberg, 10 How. Pr., 128.
2 Estee's Pleadings, p. 621, § 3639.
Andrews *vs.* Van Duzer, 11 Johns., 38.
Stilwell *vs.* Barber, 24 Wend., 105.
Bissell *vs.* Cornell, 24 Wend., 354.
McKinly *vs.* Rob, 20 Johns., 130.
Loveland *vs.* Hosmer, 8 How. Pr., 215.
Ormsby *vs.* Douglass, 2 Abb. Pr., 307.
Gorton *vs.* Keeler, 51 Barbour, 475.